90-359

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HOWARD A. ANTHONY, Petitioner,

v.

CITY OF CHICAGO, A Municipal Corporation.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RONALD A. SHUDNOW
Ronald A. Shudnow, Ltd.
77 W. Washington St. Suite 1620
Chicago, IL. 60602
(312) 641-6205
Counsel of Record for Petitioner

August, 1990

QUESTIONS PRESENTED*

1. Whether the Supreme Court of Illinois committed reversible error in reversing the unanimous decision of the Appellate Court by giving tacit approval to the trial court's acceptance of the application of the unit rule as applied to single use properties to multiple use properties when it impliedly justified the trial court's action in not allowing expert testimony as to other sign income and its valuation under Federal Rules 703 and 705 which were adopted by the Illinois Supreme Court in *Wilson vs. Clark*, 84 Ill. 2d 186, (1981). **

2. Whether the failure to allow expert testimony under Federal Rules 703 & 705 as to other rental income from comparable signs and its valuation and or the income as set forth in the sign lease proposal where highest and best use involves a multiple use and where there is no other way to value the multiple use in accordance with generally accepted appraising principles deprives defendant of his right to a fair trial on the issue of just compensation in violation of said rules and the fifth and fourteenth amendments since the effect of said exclusion is to prevent Defendant's expert from stating the basis of his opinion of value to the jury in a credible way.

[Note: Petitioner reserves the right to argue Question 3 in the event certiorari is granted on both the above questions, but does not include Question 3 among the reasons for the grant of certiorari].

3. Should the written sign lease proposal have been admitted into evidence for the purpose of highest and best use and assisting the jury in the determination of value of Petitioner's property at its highest and best use?

*First case under Federal Rules 703 and 705 which necessitates the resolution of a conflict between generally accepted appraising principles and the unit rule of valuation in Eminent Domain Proceedings. This case presents important questions respecting standards for valuing property taken for public use.

** Decision is in direct conflict with this court's decision in *United States v. Chandler-Dunbar Co.* 229 US 53 (1913) which allowed the value of a separate use for Lock and Canal purposes to be added to the value of the land taken.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

PAGE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

HOWARD A. ANTHONY,

Petitioner,

v.

CITY OF CHICAGO, a Municipal Corporation.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Howard A. Anthony, prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, entered in this cause on March 29, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (App. A, infra, 1a-19a) is reported at 136 Ill. 2d 169, 554 N.E2d 1381 (1990). The opinion of the Appellate Court of Illinois, First Judicial District, Third Division is reported at 174 Ill. App. 3d 288; 528 N.E.2d 298, (App. B, infra, 20a-37a)

JURISDICTION

The Judgment of the Supreme Court of Illinois reversing the unanimous decision of the Appellate Court, First District Third Division was entered on March 29, 1990. Petitioner filed a timely Petition for rehearing which was denied on May 31, 1990, (App.C, infra, 38a). The jurisdiction of this Court to review the judgment of the Supreme Court of Illinois is invoked under 28 U.S.C. §1257(3), (Appendix H, infra, 64a). Federal Rules 703 and 705 were adopted

by the Illinois Supreme Court in *Wilson vs. Clark*, 417 N.E.2d 1322, 84 Ill.2d 186, (1981). The federal questions appear in the order entered in the trial court on Respondent's Motions in Limine entered January 22, 1986,(App. D, infra, 39a-42a) and on the face of the Appellate and Supreme Court decisions, (App.A, infra, 1a-19a and App. B, infra, 20a - 37a), respectively. The application of a rule of exclusion in an Eminent Domain proceeding by its very nature implicitly raises a constitutional issue of whether a fair trial on the issue of just compensation has occurred if Petitioner's expert is prevented from stating an opinion of value in a credible way.

STATUTES INVOLVED

The relevant provisions of the following statutes and federal rules are set forth in Appendix H: 28 U.S.C. §1257(3), the Fifth and Fourteenth Amendment to the United States Constitution; and Federal Rules of Evidence 703 and 705, (App. H, infra 64a-65a).

STATEMENT OF THE CASE

1. Introduction

Petitioner's property was taken through Eminent Domain proceedings. Petitioner was not allowed to introduce expert testimony of rental income and its valuation for an anticipated future sign lease use. This exclusion violated Petitioner's rights under federal rules of Evidence 703 and 705. The jury could not believe a conclusion of value without facts given in support thereof.

On February 21, 1985, Respondent filed an Eminent Domain proceeding to acquire various parcels of real estate (C2-14). The parcel involved in this appeal is referred to as Parcel 67-1 and is commonly known as 300 S. Hermitage, 1735 W. Jackson Boulevard and 1757 W. Ogden Avenue, Chicago, Illinois and was owned by Petitioner, Howard A. Anthony. On February 21, 1985, the date of taking, the realty was improved with a two-story masonry constructed commercial retail store building with residential apartments on the second floor. The improvement was razed by the City of Chicago after February 21, 1985.

A jury returned a verdict in the amount of $10,910 (C331-332) and a judgment was entered on said verdict (C333-335). Petitioner's expert had valued the subject at $55,000. Respondent's expert at $8,700. The primary difference was what each had considered to be the property's highest and best use. Petitioner's expert's highest and best use was for commercial development and for outdoor

advertising. Respondent's highest and best use was for commercial development, (T154). Value is determined in reference to highest and best use. Petitioner was not allowed to have his expert testify as to the specific facts or data justifying the value of the subject at its highest and best use.

Prior to trial, Respondent filed on November 25, 1985 its Motion In Limine and Memorandum of Law in support thereof (C137-162) to prevent Petitioner from introducing into evidence a sign lease proposal dated February 12, 1985, (Exhibit 7,C605 Envelope). The first page of which is attached herein as App. G, infra, 61a-63a. The proposal provided for the erection of an illuminated sign with a face of sixty feet by twenty feet and the payment to Petitioner of $93,600 in rents over a 15 year term. Outdoor Media desired a leasehold to 48 inches of ground area. Respondent sought to prevent not only the introduction of the sign lease proposal but any testimony in reference to the rental income called for by the proposal. Petitioner filed its Response to said Motion and a Memorandum of Law in support of its response (C164-179).

Judge Conrad, the motion judge, without the benefit of an evidentiary hearing but merely by looking at the proposal, had found that the income was speculative since it was contingent upon the parties agreeing to the terms of the offer, to the proposed advertising and that it meet the conditions of the zoning ordinance, (T43-44, Appendix D, infra, 40a,).

An order was entered by Judge Mary Conrad on January 22, 1986 (C215-217, App. D, infra, 39a-42a) incorporating a transcript of proceedings (T41-55, App. E, infra, 43a-58a). The written order stated that the sign lease proposal was inadmissible, that testimony regarding future rental income to be derived from said proposal was also inadmissible and that within the limited context of highest and best use, testimony of experts who may have considered the sign lease proposal as a factor in reaching a determination of highest and best use may be allowed.

The transcript of Judge Conrad's decision was inconsistent with the written order as prepared by Respondent in that the transcript provided that the sign lease proposal should be allowed into evidence for the limited purpose of highest and best use (T44,45,46,

App. E, infra, 48a lines 1 thru 7) and that testimony related to the specific sign lease proposal would be allowed if acceptable under Federal Rules of Evidence, 703 and 705, (App. E, infra, 47a, Lines 16-24, T44-45). Petitioner filed its motion to vacate and/or modify said order (C225-233) which was denied by Judge Alfred T. Walsh, the newly assigned trial judge.

On June 12, 1986, Respondent after taking the deposition of Petitioner's valuation witness, Donald Engel, M.A.I. filed a motion in limine (C244-246, C606 Envelope-Exhibits A & B) to bar Petitioner's expert from testifying to an opinion of value based in whole or in part upon evidence of rental income under the proposed sign lease which the written order of January 22, 1986 held to be inadmissible as evidence. Petitioner filed its response to said motion and a memorandum of law in support of its response (SR2-32).

After a hearing, (T56-73), Judge Alfred T. Walsh entered an order on July 28, 1986 (C254, App. F, infra, 59a-60a) prohibiting Petitioner's expert from testifying on direct examination to the income set forth in the proposal and though not expressly stated would not allow the introduction of the sign lease proposal into evidence. The order further provided that Petitioner's expert could testify to other sign income in formulating an opinion of value.

2. The Trial Evidence:

At trial, Petitioner's expert was not allowed to testify as to other sign income in violation of the court's own ruling (T253, App. F, infra 60a). An offer of proof was made through Petitioner's attorney as to what Petitioner's expert's testimony would have been. The Judge absented himself from 95% of said offer (T282). Said offer of proof set forth the proposed lease terms and that a search of the market for sign rentals indicated that other outdoor advertising companies were paying approximately $7,000.00 per year. The offer of proof also indicated that the rental as set forth in the sign lease proposal as well as the sign lease proposal was the type of information that is reasonably relied upon by valuation experts in expressing an opinion (T282-283). This offer of proof was not objected to by Respondent.

Respondent called two veteran city appraisers to testify .

Mr. Mead's testimony was limited strictly to the physical condition of the premises. He told the jury that the overall condition of the building was poor and did not add value to the land, (T125,128).

The City also called Mr. Sylvester Kerwin, an MAI. Mr. Kerwin testified that he was retained in December of 1985 to value the property as of the condemnation date of February 21, 1985 (T151). He testified he never inspected the interior of the improvement and didn't know the actual physical condition of the interior and "couldn't certify to it." Nevertheless, it was his judgment that the building was in extremely poor condition (T163-164). Mr. Kerwin admitted that in making an appraisal, one first determines highest and best use and then establishes value in relation to highest and best use (T168-9). Mr. Kerwin also admitted that it is essential that highest and best use relate to the motivations of the market, (T169). He was aware of the market motivation for a sign on the subject property.

Mr. Kerwin valued the property as vacant at $8,700.00, 2,181 square feet at $4.00 per square foot (T160). Mr. Kerwin testified that the highest and best use of the property was to raze it and develop it commercially by assembling this parcel with other parcels because of its size (T154). Mr. Kerwin did not factor into his valuation an income stream for outdoor advertising purposes.

Mr. Kerwin stated on cross-examination that he considered the use of the property for outdoor advertising in relation to Highest and Best Use. At his deposition, he testified he had not, (T177-180). He further testified that he did not know the zoning ordinance requirements as to illuminated signs (T175). In reaching an opinion of Fair Cash Market Value, Mr. Kerwin testified that he considered comparable sales. He testified that those sales were comparable to the subject even though they were either too close to a major expressway to be considered for sign due to their violation of the zoning ordinance or too far as not to be desired for illuminated sign lease use.

Mr. Anthony testified he had acquired the subject property for $7,500, (T195). At time of purchase, the building was vacant and boarded up. The first floor had three stores and the second floor had

three apartments, (T196). Since purchase there had been substantial growth in the area, (T208-9).

Petitioner's appraiser, Mr. Donald Engel, an MAI, was retained in March of 1986. He testified that the neighborhood is two miles west of the loop and has been in decline but in the last few years had enjoyed a resurgence of activity with a substantial amount of new development (T232). The dominant force in the area was the Presbyterian St. Luke's Hospital located across from the Congress Expressway. The expressway is a block south of the subject.

Mr. Engel testified that in his opinion the value of the subject property was $55,000. He took into consideration the value of the underlying land, the value of the then existing improvement and the value of the potential income from sign leasing (T251). In arriving at a final value conclusion, he considered the property as a whole and the influence of each of those factors, (T255). He determined the Highest and Best Use of the property was for commercial development with income from sign. He had spoken with the writer of the proposal and that the terms were reasonable as to rental and that its achievement was reasonably assumable (T251). He had determined that the use of the property for illuminated sign was feasible (T237) and that such use would conform to the zoning and electrical sign ordinance. He had discussed zoning compliance with a member of the zoning board (T269).

Petitioner's expert further testified that his investigations revealed that in fiscal 84 and 85 the City Council approved 19 illuminated signs applications and that said applications were similar in character to that which would have to be submitted for the subject. He testified that none were declined (T247). He went to the municipal reference library to determine the approval history of similar type signs (T247). He tabulated those applications and approvals for the past two fiscal years (T247-8), and made statistical computations in reference to each one of the years involved. He testified that for fiscal year 1984-85, 159 requests for approvals were made. 116 were passed and none were declined. For years 1983-84, 161 orders were requested, 136 passed and none were declined (T249).

Petitioner's exhibits 10 thru 12, (C 605 Envelope) which were official Indexes to the Journal of Proceedings of the City Council and Exhibits 13 thru 17 (C605 envelope) which were the Journal of Proceedings of the City of Chicago corroborated Petitioner's expert's statements. These exhibits were not allowed into evidence.

The subject property is located approximately 500 feet from the Eisenhower Expressway. There was a demand for said property for outdoor advertising purposes. This demand was corroborated by a sign lease proposal made by Outdoor Media Inc. The proposal was dated February 12, 1985 which was nine days prior to the date Respondent filed its Condemnation Suit. This proposal was received by Petitioner, (Exhibit 7, C605 envelope, App. G, infra, 61a-63a). Mr. Engel made a determination that the location of that property complied with the zoning ordinance for outdoor sign advertising (T242). Petitioner's evidence as to compliance with the zoning ordinance was uncontradicted.

Mr. Engel was not allowed to testify to the proposed income stream set-forth in the proposal which was indicative of the market for similar type signs nor other sign income justifying his valuation.

During closing argument, Respondent's attorney called for a component valuation when she stated: How did he get to that additional $30,000 in value (T304). Mr. Engel had valued the income stream from sign at $38,000 in his written appraisal, (Trial Record Exhibit A, C606 Envelope).

The jury returned a verdict of $10,800 which did not factor into its valuation determination the property's availability for sign leasing (T333-34). Testimony was not allowed by Petitioner's expert as to the sign income under the proposal because of the court's ruling on Respondent 's Motion in Limine. Petitioner's expert was not allowed to testify as to other sign income in violation of the same order, (App. F, infra. 60a). The proposal and a certified copy of the zoning ordinance and electrical sign ordinance were not admitted into evidence as well as official records of City council meetings which disclosed that signs similar to that proposed for the subject were approved without one denial for the previous three years.

Petitioner's expert's Eisenhower Corridor Map depicts the proliferation of illuminated sign approvals. This exhibit was not allowed into evidence, (Exhibit 18, C605 envelope). Offers of proof as to all excluded evidence were duly made without objection (T278 thru 283).

3. The Appellate Court Proceedings:

The appellate court reversed, finding that Petitioner's expert should have been permitted to testify concerning the value of sign income he considered as a basis for his opinion, (174 Ill App.3rd at 296, App. B, infra, 30a,) and should have been allowed to testify as to the average rental paid for similar signs as that proposed for the subject, (174 Ill App.3rd at 297, 298, App. B, infra, 32a-33a). The trial court's finding that the rental income offered by Outdoor Media under the sign lease proposal was speculative and futuristic was contrary to the weight of the evidences, (174 Ill App.3rd at 297, App. B, infra, 32a). The appellate court further found that the sign lease proposal should have been admitted into evidence for the purpose of highest and best use but the court should instruct the jury as to the purpose of its admittance, City of Chicago v. Anthony, 174 Ill. App. 3d 288, 296-99 (lst Dist. 1988, App. B, infra 33a-34a). Respondent filed a petition for leave to appeal, which the Supreme Court of Illinois allowed on December 8, 1988.

4. The Illinois Supreme Court Proceedings:

The Supreme Court of Illinois in its opinion of March 29, 1990, (App. A, infra, 1a-19a) reversed the unanimous decision of the appellate court and held that the proposal should not be admitted into evidence since it is an improper element for valuation purposes. It did not address its introduction for highest and best use as the appellate court did. It categorically denied admissibility for all purposes. The court placed its emphasis on the proposal and justified the trial court's exclusion of other sign income, (App. A, infra, 18a). It disregarded completely that the purpose of the expert's testimony as to other sign income was to value the subject property at its highest and best use and to show that the sign income as set forth in the proposal was indicative of market.

REASONS FOR GRANTING THE WRIT

I. The decision below not to allow the valuation of an income stream for sign gives tacit approval to the application of the unit rule as applied to single use properties to multiple use properties and will create confusion, misunderstanding and will be applied improperly by federal and state courts.

This court must resolve the conflict between generally accepted appraising principles which an expert should be allowed to testify to under Federal Rules 703 and 705 and the unit rule of valuation which the Supreme Court of Illinois in Anthony applies improperly.

Egregious errors have been committed which will have a profound effect on future condemnation cases. The principles of law as enunciated in Anthony are excellent but their application to the facts necessitate modification and clarification to prevent confusion and valuation problems from arising in the future. It was a mistake of Law for the motion Judge and Trial Court to apply the general unit rule and not the exception to a property which involves the valuation of a multiple use. The Illinois Supreme Court gives express or tacit approval to the application of the general rule to a multiple use property.

The motion judge in ruling on the City's motion in Limine of November 25, 1985 misapplied the unit rule of valuation.

As to the unit rule of valuation the Illinois Supreme Court in its opinion stated as follows, (App. A, infra, 4a):

> "On December 20, 1985, a judge (hereafter referred to as the motion judge) ruled on the motion. The motion judge found the property must be valued as a whole, and a lease may not be separately valued as one part to be added to another part. This ruling is consistent with the unit rule of valuation in eminent domain cases, which requires that property be valued as a whole. Because the "measure of recovery for damage to private property caused by a public improvement is the loss which concerns the property itself *** the fair market value of improved property is not the sum of the value of the building and the

value of the land computed separately." *(Department of Public Works & Buildings v. Lotta* (1963), 27 Ill. 2d 455, 456.) The unit rule is applied in eminent domain cases to avoid misleading the jury."(Emphasis ours)

The motion judge's finding that the property must be valued as a whole, and a lease may not be separately valued as one part to be added to another part is consistent with the general application of the unit rule. This rule has been applied to single use properties where highest and best use does not involve a multiple use. The Illinois Supreme Court acknowledged that neither petitioner or respondent cited one case comparable to Anthony, (App. A, infra, 15a). What makes Anthony different is that its Highest and Best Use involves a multiple use. Petitioner's expert valued the land, building and an income stream from sign leasing. He utilized the rental as set forth in the proposal because he found same to be indicative of market, (T282-283). This necessitated a component valuation of the income stream. The latter methodology is consistent with generally accepted appraising principles which provides for the valuation of each of the contributory uses. The following quote is taken from *The Appraisal of Real Estate*, Eighth Edition, American Institute of Real Estate Appraisers at pages 263 and 264 which Respondent's expert admitted was an authoritative text which he relied on, (T161,192):

"Highest and best use often includes more than one use for a parcel of land or for a building...Moreover, the same land may serve multiple functions...An appraiser can often estimate the contributory value of each use on a multiple use site or in a multiple use building....In all such appraisals, an appraiser must make sure that the sum of the values of the separate uses does not exceed the value of the total property."

The Unit Rule has been applied primarily when a single use is involved and or where various interests of the fee are held by different entities. The purpose is to make sure that the condemning body does not pay a sum greater than the value of the whole, *United States v Honolulu Plantation Co.*, 182 F2d 172,179, (9th Cir. 1950). The method of valuation based upon the undivided fee has been criticized where there exists a great disparity between the value of

the undivided fee and the aggregate value of the separate interests. Valuation of the separate interests under such circumstances has been held to be constitutional, *Boston Chamber of Commerce v. Boston*, 217 US 189,195, (1910), *United States vs Welsh*, 217 US 333,337-38, (1910). Anthony does not involve a division of interests because Anthony owns the undivided fee but Anthony does involve the valuation of a multiple use. Petitioner's expert was not allowed to value the component in accordance with generally accepted appraising principles and this prohibition violated Petitioner right to have his expert state the basis of his opinion pursuant to Federal Rule 703 and 705. In *United States v. Citrus Valley Farms, Inc*, 350 F2d 683, 687 (9th Cir. 1965) the jury was allowed to value a cotton right allotment separately and add it to the value of the lands because of its enhancement.

It was a mistake of law to improperly apply the unit rule as applied to single use properties to multiple use properties. Petitioner agrees with the Illinois Supreme Court's statement that it is eminent domain law which controls the admissibility of evidence for its truth but takes exception to its including also "and the limited purpose of explaining the basis for an expert's opinion", (App. A, infra, 15a) since in 1981 it adopted Federal Rules of Evidence 703 and 705. It is Federal Rules of Evidence 703 and 705 which Illinois adopted which now controls the parameters for the expert in stating the basis for his opinion. Federal and State Court's look to the substantive condemnation law of Illinois in the taking of Illinois lands. Federal Courts also apply the Federal rules where there is a taking by a federal agency or where a case is decided where diversity exists. In *United States v 70.39 Acres of land*, 164 F Supp. 451 the court stated:

> "What is property for which compensation must be paid upon its taking is governed by the law of the state in which the property is located. However, the quantum and method of proving just compensation is a federal question and is governed entirely by federal law."

Federal and State courts are now looking to Illinois's interpretation of the Federal Rules since its adoption in 1981 of Federal Rules 703 and 705. Uniformity of interpretation is of extreme importance.

Petitioner agrees with the Illinois Supreme Court's statement that if another rule of law applicable to the case excludes the information

sought to be relied upon by the expert, the information may not be permitted to come before the jury under the guise of a basis for the opinion of the expert, (App. A, infra, 14a).

The Illinois Supreme Court improperly justifies the motion judge's application of the unit rule as applied to single use properties to multiple use properties, (App. A, infra, 4a). The motion judge and trial court committed an error of law by failing to make the distinction. This court should address this very important issue. The Illinois Supreme Court is implicitly saying that to value the income stream as a component is improper. How else could an expert value a multiple use unless it applied generally accepted appraising principles? This Court must address this issue.

In *Olson v United States*, 292 U.S. 246, 257, (1934), aff'g, 67 F2d 24 it was said that every element which affects value and which would influence a prudent purchaser should be considered, see also *United States v. Chandler-Dunbar Power Co.* 229 U.S. 53, 76,77,79, (1913) where separate elements of value were added to the value of the land. Each case necessarily differs from all others insofar as its factual situation is concerned and exceptional circumstances render imperative a fair degree of elasticity in application of fundamental rules, *United States v. Cors*, 337 US 325, 329, (1949) .

In *Department of Public Works & Buildings v. Lotta* (1963), 27 Ill. 2d 455, 457,458.) the Illinois Supreme court stated that one could value a component but there must be a showing that the market value of the property as a whole was enhanced to the extent of such figure citing Forest Preserve District v. Chilvers, 344, Ill. 573,578. The court stated:

> "... Where such evidence has been received over objection, we have reversed, whether an expert opinion has been based on the value of the buildings separate from the land,.....or evidence of the value of the buildings was received "**without any showing being made that the market value of the property as a whole was enhanced to the extent of such figure or in any other amount.**" *Forest Preserve District v. Chilvers*, 344 Ill. 573, 578. (Emphasis ours)

For the Illinois Supreme Court to apply the general rule of *Lotta*

without addressing its exception of enhancement by the component is not fair comment and prevents the legal bar from understanding one of the substantive issue of this case and will cause Judges and the Bar to be confused when dealing with multiple use properties.

As the appellate court noted: (174 Ill. App. 3d at 296, App. B, infra, 31a):

> "The trial court, however, precluded any testimony as to the value of the sign income, a factor which Engel considered in the $55,000 valuation. The trial court's ruling was error and resulted in confusion for the jury regarding Engel's valuation testimony. The error was heightened when, during closing argument, plaintiff's counsel stated that approximately $30,000 was unaccounted for in Engel's valuation amount."

The exception to the general rule as enunciated by the Illinois Supreme court in Lotta provides flexibility and allows this court to address properly multiple use properties which is consistent with generally accepted appraising principles. This court should not allow the improper application of the unit rule by the circuit court and the Illinois Supreme Court to deprive Petitioner's expert of the right to value a component and explain how the value of said component enhances the value of the property as a whole consistent with Lotta. This case will adversely affect similar condemnees where Highest and Best Use may involve using part of their vacant land for parking or for a drive thru such as a Fotomat franchise or where some lots in a subdivision should be developed for commercial use and some for residential. In *United States v Miller*, 317 U.S. 369, 375-376 (1943), this court said that in order to obtain substantial justice in Eminent Domain proceedings it is necessary for courts to adopt working rules to fit the particulars of each case. This court has said that the determination of value of property as the basis of compensation due under the 5th amendment cannot be reduced to inexorable rules, *United States v Toronto, H & B Navigation Co.*, 338 US 396, 402, (1949). Just compensation is determined by "equitable principles," and its measure varies with the facts, *Seaboard Air Line R. Co. v. United States*, 261 US 299, 304, (1923). The owner should be put in as good a position pecuniarily as he would have been if his property had not been taken.

The application of the general rule to a multiple use property is a mistake of law. The trial court's mistake of law should not be allowed to deprive Petitioner of his right to just compensation as guaranteed by the Illinois Constitution and the fifth amendment of the United States Constitution which was made applicable to the states by virtue of the fourteenth amendment to the United States Constitution. The improper application of the unit rule and the exclusion of other market rental testimony under Federal Rules 703 and 705, deprives Petitioner of his opportunity to convey to the jury the specific basis of his opinion of value and deprives him of due process of law. In *Davidson vs. New Orleans*, 96 U.S. 97, 105, (1877), this Court said that:

> "... it is not possible to hold that a party has, without due process of law, been deprived of his property, when,.... he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such case.."

This Court stated in *Seaboard Air Lines v. U.S.* 261 US 299, 300, (1923) that under the constitution all that is required for ascertaining just compensation is that the trial be conducted in some fair and just manner with opportunity for the owner to present evidence and be heard. Petitioner is being deprived of due process by not being able to substantiate his expert's valuation determination in a way that makes it credible. Petitioner's property, located within 500 feet of a major expressway, was unique. Similar properties used for sign were not sold. This court has said where for any reason property has no market resort must be had to other data to ascertain its value, *US v Miller*, 317 US at 374.

The Illinois Supreme Court improperly assumes that Petitioner was able to put before the jury income to be generated from sign, (App. A, infra, 18a). This is not correct. The jury never heard testimony as to market rentals to be derived from sign use.

If Petitioner could have had testimony as to income introduced before the jury the verdict may have been different. The jury would have seen there was a credible basis to believe a $55,000 valuation.

To place ones theory as to highest and best use before the jury is important but more important is the ability to show a credible value at that highest and best use which Petitioner was not able to do. Respondent's attorney asked the jury during closing argument the

following:

> "Was there any evidence from the stand that said there was a similar piece of property with a similar sign that generated a certain amount of income. How did he get there, he has to give you facts (T304). Is it fair to tell you without giving the evidence to show you how he got that that number. Is it fair to you to say, accept what I tell you and add $30,000 in value. Is it fair to tell you without giving the evidence to show you how he gets to that number" (T304, Aplee Br. p.68).

Petitioner, if he could have introduced income from comparable signs would then have had an opportunity for a fair trial. That is why the appellate court stated at 174 Ill.App. 3d 296, App. B, infra, 30a):

> "Defendant's expert indicated that he considered the value of the sign income in valuating the property at $55,000. On cross-examination, plaintiff's counsel inquired as to the factors which Engel considered in arriving at that valuation amount. Engel stated the value of the underlying land was $7,600, and that the building added a value of $12,000. The trial court, however, precluded any testimony as to the value of the sign income, a factor which Engel considered in the $55,000 valuation. The trial court's ruling was error and resulted in confusion for the jury regarding Engel's valuation testimony. The error was heightened when, during closing argument, plaintiff's counsel stated that approximately $30,000 was unaccounted for in Engel's valuation amount."

Please note that the Appellate court is referring to sign income and not necessarily that as indicated in the proposal. This will be addressed shortly.

The Lotta exception for multiple use properties should have been applied. The failure of the Illinois Supreme Court to address petitioner's argument as to no violation of the unit rule, (Aplee Br. p. 65-70) is a disservice to property owners, the practicing legal eminent domain bar and professional appraisers. This is especially true since the Illinois Supreme court in its opinion gives express and implicit approval to the motion judge's application of the unit rule to the facts in Anthony, (App. A, infra, 4a-5a). The Anthony decision will be used improperly by the courts and bar. This court should clarify.

The Illinois Supreme Court said if another rule of law is applicable to the case excludes information, it may not come before the court in the guise of expert testimony, (App. A, infra, 14a). The exception to the unit rule permits this data to come before the jury. This court must weigh the harm effectuated by the improper application of the unit rule against the possibility of governmental bodies taking private property without just compensation in violation of our Federal and State Constitution. The improper application of a rule of exclusion deprives Petitioner of just compensation.

The Circuit Court applied the general rule of law incorrectly because it failed to distinguish between multi use facilities and single use facilities. The Illinois Supreme court stated that the determination of the proper factors which may be taken into consideration in determining just compensation must be determined by the trial court as a question of law citing *Johnson*, 343 Ill. at 16, (App. A, infra, 15a). The trial judge and Judge Conrad, the motion judge applied the general rule of Lotta. The exclusion of market rental and the exclusion of the valuation of market rental for a multiple use property is a mistake of law and must not be permitted to stand. This court must not allow a circuit court and the Supreme Court of Illinois to improperly apply a legal eminent domain rule of law which is applicable to a single use property and apply it to a multiple use property.

As noted, highest and best use sets the parameters for a valuation determination. *Lotta, Generally Accepted Appraising Principles and this court's decision in United States v. Chandler-Dunbar Co.* 229 U.S. 53, (1913) provides a legal basis for valuing the multiple use if it can be shown that such use would enhance the property's fair market value.

The Illinois Supreme court also stated that the limits of the evidence necessarily rest largely in the discretion of the trial judge, (App. A. infra, 15a). The motion judge and the trial judge did not address properly a multiple use property. One can not exercise discretion properly if one is applying the wrong rule of law. This Court can modify the decision to provide ascertainable standards that will address single use and multiple use properties consistent with Generally Accepted Appraising Principles and thus prevent confusion and errors of law from occurring.

II. The improper application of Federal Rules 703 and 705 by the Illinois Supreme Court will have an adverse effect on uniformity of interpretation by Federal and State courts and will lead to confusion. Said Courts interpretation is inconsistent with holdings of other Federal Court Circuits.

The rulings by the lower court and the Illinois Supreme Court excluding testimony as to other sign income and its value violated Federal Rules of Evidence 703 and 705 and is in direct conflict with the sixth circuit's holding in *Mannino vs. International Manufacturing Company*, 650 F2d 846, (6th Cir. 1981), the fifth circuits opinion in *United States vs Williams*, 447 F.2d 1285, (5th Cir. 1971) and the Illinois Supreme Court decision in *Melecosky v. McCarthy Brothers Co.* (1986), 115 Ill. 2d 209, 503 N.E.2d 355. Further, the Anthony decision violates the spirit and reason why Federal Rules 703 and 705 were adopted which was to broaden the basis for expert opinion beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of experts themselves when not in court, 28 U.S.C.A. R. 703, Notes of Advisory Committee on proposed Rules, at 98 (1984).

Federal Rule 703 provides that an expert may base his opinion on facts or other data which are reasonably relied upon by experts in formulating their opinions. Rule 705 deals with the disclosure or nondisclosure of the basis for an expert's opinion. Federal Rule 705 gives the trial Court the discretion to order an expert to state the basis of his opinion but it does not give the trial Court discretion to order an expert not to divulge the basis of his opinion as the trial Court so directed in its Court order of July 28, 1986 (C254, App. F, infra, 60a) unless it first determines that the facts or data are not such that are reasonably relied upon by experts. The trial court did not voire dire Petitioner's expert and thus could not have made a determination as to the propriety of the rental income that Petitioner's expert would have testified to. The order entered by the trial court pursuant to a motion in limine filed by Respondent violated Federal Rules of evidence 703 and 705 which were adopted by the Illinois Supreme Court in 1981 in *Wilson v. Clark* (1981), 84 Ill.2d 186, 49 Ill.Dec.

308, 417 N.E.2d 1322.

In *Mannino vs. International Manufacturing Company*, 650 F.2d 846, 851-853 (6th Cir. 1981), at the trial level, a bio-mechanical engineer was not allowed to testify that an infant car seat was improperly designed. The expert's opinion was based on his experience with bio-mechanics, his readings, his attendance at seminars and on special articles in the field. The Court of Appeals reversed saying:

> "The trial Judge misconceived his responsibilities under Rule 703. Great liberality is allowed the expert in determining the basis of his opinion under Rule 703. Whether an opinion should be accepted is not for the trial judge. That is for the finder of fact."

If the case had involved other data such as the valuation of an income stream or testimony as to market rentals or testimony as to the rents specified in a proposal directed to the subject property like the Anthony case, said court would have allowed said testimony after making a determination that the facts and data were of the type reasonably relied upon by experts. The Anthony decision and other case law should create flexibility in the law and afford a judge discretion in its determination. The law is and should be interpreted as such that Federal Rules of Evidence 703 and 705 apply to all types of information used by an expert valuation witness. It should apply to allow a valuation witness to detail his calculations and to explain the basis of his opinion and leave to cross examination the discrediting of said testimony. The proper policy is to decide cases on facts. Specific evidence of unreliability is a proper subject for impeachment of the expert's opinion, *Manning v. Mock*, 119 Ill. App.3d 788, 457 N.E.2d 455, 461, (1983). The jury should determine the weight to be given to said testimony.

In *United States vs. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971), the court held an expert witness can express his opinion as to value even though his opinion is based in part or solely on hearsay sources. The Court noted that the rational for this was:

> "... the expert, because of his professional knowledge and ability is competent to judge for himself the reliability of the

records and statements on which he bases his expert opinion."

The *Williams* case involved an expert named Jeffrey for the Plaintiff, the United States of America, for whom he appraised oil and gas properties. Jeffrey applied the concepts derived from his professional experience to reach an opinion as to value. On page 1292 the court stated as follows:

> "...He projected the future gross income of the leases using estimated rates of production and the selling price of oil and gas, and then adjusted this figure to net income by deducting estimated expenses, taxes and capital expenditures. The estimated future net income was then discounted to ascertain its present value. Following customary practice Jeffrey then selected an "arbitrary" fraction of the present value of the future net income as representing the fair market value of the leases..."

Petitioner's expert's opinion was also predicated upon a present value approach but his approach related to the sign income under the proposed sign lease which he determined to be indicative of market (Trial record App. Exhibit A, C606 Envelope). Mr. Engel, however, was prevented from explaining to the jury the specific bases for his opinion.

It was never the intent of Judge Conrad's order (C215-217,T41-56, App. D, infra, 39a-42a, App. E, infra, 43a-58a) to dictate to the expert that he could not consider or testify to the proposed sign income as one of the many factors in the formulation of an overall opinion of value, just as the *Williams* court did not prevent the United States Government's expert from taking projected future gross income into consideration. The holdings in *Mannino* and *Williams* case are in direct conflict with the decision of the Illinois Supreme Court in Anthony. The former allow great liberality to the expert in stating the basis of his opinion. This court must clarify.

Petitioner's expert should be allowed to express an opinion of value based upon all facts and other data which an expert would reasonably rely on in formulating an opinion of value. Judge Conrad stated in her decision on Respondent's motion in limine filed

November 25, 1985 that testimony related to the specific sign lease proposal which would be acceptable under Federal Rules of Evidence, 703 and 705 would also be admissible, (T44, App. E, infra, 47a, Lines 17-35 and 1-5).

In the instant case, the offer of proof made by Petitioner through his attorney, (T274-284) disclosed that the testimony of Mr. Engel would have been that such a sign proposal and the income offered thereunder is the type of data which is reasonably relied upon by expert's in valuing property. Even respondent's expert testified that if he had determined that sign usage was an element of the subjects highest and best use, he would have considered ancillary income in determining value (T169-171). The failure to allow testimony as to the proposed sign income and market rents prevented Petitioner from supporting his ultimate conclusion as to the value of the subject property as a whole. In *Mississippi and Rum River Boom Co. v. Patterson*, 98 U.S. 403, (1878) this court said:

> "In determining value of the land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry must be what is the property worth in the market viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses..... Its capability of being made thus available gives it a market value which can be readily estimated."

Since testimony as to other sign income was not allowed, petitioner was prevented from giving proper support to his valuation determination at the property's highest and best use. Since the trial court judge absented himself from the hearing of the offers of proof, (T282) there was no possibility that Judge Conrad's order could be complied with. Where was the Judge to determine if the testimony would be acceptable under the Federal Rules.

In *People v. Anderson* (1986) 113 Ill.2d 1, 9-10, the Illinois Supreme Court held that an expert may rely on records and reports which are trustworthy and customarily relied upon, and may also

recite the contents of those records on direct examination in explaining the basis of said experts opinions. The Illinois Supreme Court said as follows:

> "Rule 703 was designed to "broaden the basis for expert opinions and to bring the judicial practice into line with the practice of the experts themselves when not in court....the rule thus expands the range of information available, at least indirectly, to the trier of fact. Inasmuch as the opinion based on these materials which are deemed trustworthy by the profession-is allowed, it would be both illogical and anomalous to deprive the jury of the reasons supporting that opinion....
> To prevent the expert from referring to the contents of materials upon which he relied in arriving at his conclusion "places an unreal stricture on him and compels him to be not only less than frank with the jury but also to appear to base his diagnosis upon reasons which are flimsy and inconclusive when in fact they may not be." (Emphasis Ours)

It was a mistake of law not to allow testimony as to other sign income and its valuation because the subject property could not then be valued at its highest and best use. The Illinois Supreme Court misinterprets why the appellate court reversed the trial court on this point.

The improper justification of not allowing testimony as to market rental necessary to value property at its highest and best use will have a profound effect on property owners and will create confusion. The substantive rule of law as to admission of rental testimony should not be placed in jeopardy, (Aplee Br. p. 20). This rule of law has been in effect for years.

City of Chicago V. Augusta Lehmann, 262 Ill. 468,473(1914), sets forth a substantive rule of eminent domain law. In Lehmann the condemnee was prevented from cross examining Petitioner on income that would have been earned from erecting flat buildings on their vacant land. The court stated as follows:

"The witnesses said that this property was adapted to the

> particular use to which it would undoubtedly be devoted, and they fixed the values upon the basis that it would be used for that purpose. In order to test the value of their opinions it was competent to show the income that would be derived from the property on their theory, since it appeared from the testimony of the witnesses, as well as from common experience, that values are largely controlled by income."

The Uniform Eminent Domain Code, approved by the National Conference of Commissioners on Uniform State Laws provides in Section 1109 as follows:

> " as a basis for an opinion as to value, a valuation witness qualified under §1103 (a) may consider the terms and circumstances of any lease made in good faith that included all or part of the property being valued or of comparable property whether the lease was made before or after the valuation date".

The Code in § 110 provides that the valuation witnesses may consider actual or reasonable net rental income attributable to the property when used for its highest and best use, capitalized at a fair and reasonable rate.

Petitioner's expert was prevented from testifying to his application of generally accepted appraising principles in making his valuation determination. Petitioner's expert was not allowed to explain to the jury his estimate of the contributory value of sign lease usage and why it enhanced the value of the subject property as a whole.

Generally accepted appraising principles provide that market rentals, which Petitioner was not allowed to testify too, are the type of information that appraisers must use. It is widely recognized in appraisal theory that market rental should be used in doing an appraisal where owner occupied properties are involved.

The following quotes are taken from *The Appraisal of Real Estate*, Eighth Edition, American Institute of Real Estate Appraisers:

> "To a certain extent, the interest being appraised determines how rents are analyzed and estimated. The valuation of fee simple interests in real estate is based on the market rent the

property is capable of achieving. Typical situations include proposed projects (without actual leases), properties leased at market rent, and owner-occupied properties. In such instances, only **market rent estimates** are used in the income capitalization approach.

The valuation of a lessor's marketable interest (leased fee) in real estate generally requires considering both existing contract rent (which may or may not be at market rent) for leased space and market rent for vacant and owner-occupied space. In addition, when discounted cash flow analysis is contemplated, future market rent estimates are required..." (at P. 357) (Emphasis Ours)

"Market rent is the rental income that a property would most probably command in the open market as indicated by current rents being paid and asked for comparable space as of the date of the appraisal..." (at P. 353)

In Anthony, discounted cash flow analysis was utilized by Petitioner's expert as well as future market rent estimates but the trial court refused to allow said testimony and thus prevented Petitioner's expert from stating the basis of his opinion.

The Illinois Supreme court misinterpreted why the appellate court's decision allowed testimony as to other sign income. The Illinois Supreme Court said, (App. A, infra, 18a): as follows:

"The circuit court correctly prohibited defendant's expert from stating the specifics of the rental income contained in the sign lease proposal as a basis for his opinion of the fair cash market value of the subject property. As a result, the actual dollar amounts of income received pursuant to other sign leasing agreements on other parcels of property would not serve to "shed light" upon the basis for the expert's opinion regarding rental income set out in the sign lease proposal." (Emphasis Ours)

The Illinois Supreme court misinterprets the appellate court's decision. The primary purpose of allowing other sign income was to value the subject property at its highest and best use which involved a multiple use. The appellate court in *Anthony* specifically

said at 174 Ill. App. 3rd at 298,(App B, infra, 33a) as follows:

> "We believe that in the instant case, defendant's expert should have been allowed to testify as to an average rental income for other signs, **insofar as defendant's expert took into account potential sign rental income in determining the value of the subject property.** Testimony regarding the market rental income from other similar signs would shed light upon the basis for the expert's opinion regarding the value of the rental income contained in the sign lease proposal."(Emphasis Ours)

The focus of the Illinois Supreme court should have been directed to the first statement of the appellate court as to value of the subject property at its highest and best use. The focus should not have been directed to the appellate court's supplemental statement that it would shed light upon the basis for the expert's opinion regarding the value of the rental contained in the sign lease proposal. Petitioner's expert did use the rental figures as contained therein only because his investigation of market rentals indicated that said figures were indicative of market. The court's focus is improper and is not what the appellate court said or meant. The Illinois Supreme court's interpretation would exclude relevant testimony as to value of the property at its highest and best use. Eminent domain law as well as generally accepted appraising principles provide for market rentals to be introduced. To exclude testimony as to other market rentals because it may be reflective of rentals indicated in an inadmissible documents is improper and would set a bad precedent.

Further, the Illinois Supreme Court misinterprets the appellate court when it states in its opinion, (App. A, infra, 11a) the following:

> "The appellate court found the excluded testimony of defendant's expert, Mr. Engel, regarding the value of the sign income reflected in the proposed sign lease, to clearly come within that allowable under Federal Rules of Evidence 703 and 705. As such, the appellate court concluded it was error to prohibit defendant's expert from testifying about the sign lease proposal. The

> appellate court held the circuit court's finding that the rental income from the sign lease proposal was "speculative" and "futuristic" to be contrary to the weight of the evidence". (Emphasis Ours)

The Supreme court's statement misinterprets the meaning of the appellate court's decision: The appellate court said at 174 Ill. App. 3rd 296, (App. B, infra, 30a) the following:

> "In view of Federal Rules 703 and 705, *Wilson v. Clark*, and other case law interpreting the rules, we find that the trial court committed error in precluding the expert from testifying regarding the value of the sign income. Defendant's expert indicated that he considered the value of the sign income in valuating the property at $55,000..." (Emphasis Ours)

The latter statement does not say the sign income reflected in the proposal. The appellate court was referring to the value of sign income from his investigations. The appellate court used the word considered. The reason is that the appraiser took into consideration other sign income and sign income as indicated in the proposal which Engel found to be indicative of market, (T282-283). Actually, Engel, took a conservative approach since the offer of proof disclosed that outdoor advertising companies were paying approximately $7,000 per year and Petitioner was only offered $5,200 for the first year, (T 282-283, Aplee Br. P. 9). The Illinois Supreme Court misinterprets the appellate court's meaning. The appellate court stated that the proposal should only be introduced for Highest and Best Use and not to enhance damages and the jury should be so instructed, (174 Ill. App. 3rd at 299, App. B, infra 34a).

Reliance by Petitioner's expert on the income set forth in the proposal under federal rule 703 and 705 would only have been justified if he found it to be indicative of market. He had already found that zoning and city council approval was not a problem. To examine the reasonableness, the court should have voire dired the expert as to his investigation of market rentals. If after hearing the testimony as to other market rentals from sign only then could the trial judge properly have exercised his discretion to exclude

testimony as to other market rental from sign and its value. Then and only then could the trial judge have known that the rental income Engel used for the basis of his opinion was indicative of market. This is the proper interpretation of what the appellate court meant.

To exclude testimony as to the value of other market rentals because it may be reflective of rentals indicated in an inadmissible document is improper and would also set a bad precedent.

As the Illinois Supreme Court stated in its opinion, (App. A, infra 13a-14a)

> "The underlying facts or data are admitted "for the limited purpose of explaining the basis for the expert witness' opinion." *(People v. Anderson* (1986), 113 Ill. 2d 1, 12.) Even though the facts or data underlying an expert's opinion are not offered for their truth, a "key element in applying Federal Rule 703 is whether the information upon which the expert bases his opinion is of a type that is reliable." *(Wilson,* 84 Ill. 2d at 193.)...
>
> Other courts have indicated that it is for the circuit court, in the exercise of its discretion, to determine whether the underlying facts or data upon which an expert bases an opinion are of a type reasonably relied upon by experts in the particular field...In *Soden,* the court noted that such inquiry into whether the basis for the expert's opinion meets this standard must be made on a case-by-case basis and should "focus on the reliability of the opinion and its foundation rather than merely on the fact that it was based *** upon hearsay." *Soden,* 714 F.2d at 503...
>
> We hold that it is for the circuit court, in the exercise of its discretion, to determine whether the underlying facts or data upon which an expert bases an opinion are of a type reasonably relied upon by experts in the particular field. Such a determination shall not be disturbed unless there has been an abuse of discretion." (Emphasis Ours)

It is clear that the circuit court abused its discretion because it did not voire dire petitioner's expert to determine if other sign income

was reliable. Whether said income was indicative of market and thus justified Engel's use of the rental which also was reflected in the proposal. The offer of proof discloses Engel was justified. What's more Engel could have testified to a higher yearly rental figure or other value than that used in his written appraisal. The trial court abdicated its independent responsibility to decide if the bases of Engel's opinion met the minimum standards of reliability as a condition of admissibility, *In re Agent Orange,* 611 F. Supp. 1223, 1245, affd (2d Cir. 1987), 818 F.2d 187. The trial court did not even know what Engel's testimony was going to be!

Further, the Illinois Supreme court's focus appears to rest primarily on Highest and Best Use but it should equally address value at that Highest and Best Use. By not doing so, it misinterprets the Appellate Court's reasoning. In its decision, (App. A, infra, 5a), the court citing the motion Judge (T44) states as follows:

"Concerning the use of the sign lease proposal for the purpose of supporting defendant's theory of highest and best use, the motion judge ruled,

> "The Court will allow testimony related to the specific sign lease proposal which would be acceptable under Federal Rules of Evidence, 703 and 705, which were adopted by the Illinois Supreme Court in 1981 in Wilson v. Clark ***. And also in Department of Transportation v. Charles Beeson ..."

The Illinois Supreme Court failed to make the following statement in reference to the motion judge's ruling in reference to value at the property's highest and best use:

Concerning the value of the property at its highest and best use, the motion judge ruled:

> "The Court will allow testimony as to Defendant's theory of highest and best use for the property and testimony as to the value of the property at its highest and best use in that limited context. **The Court will allow testimony related to the specific signed lease proposal which would be acceptable under Federal Rules of Evidence, 703 and 705....",**(T44), App. E, infra, 47a, lines 17-24 and 1-5), (Emphasis Ours).

The trial judge did not implement this directive. Petitioner's expert was not allowed to testify to the sign income under the proposal or other sign income, not because Judge Conrad so ruled but because of the trial judge abused its discretion by not determining what Engel's testimony would have been and if in fact it was reliable. The motion judge exercised discretion when she stated "The Court will allow testimony as to Defendant's theory of highest and best use for the property and testimony as to the value of the property at its highest and best use in that limited context. **The Court will allow testimony related to the specific signed lease proposal** which would be acceptable under Federal Rules of Evidence, 703 and 705.

The trial court abused that discretion because the record reflects that Petitioner's appraiser found that zoning compliance was not a problem nor was city council approval. Further, the trial court did not voire dire Petitioner's expert in reference to other income. The appraiser's findings were uncontested on the record, (Applee Br. p. 34-40).

The Illinois Supreme court in stating that the finding by the circuit court that the proposed rental income was speculative was not, on this record, against the weight of the evidence, (App. A, infra, 16a) improperly assumes that the motion judge heard evidence or testimony as a basis for her ruling. The basis of Judge Conrad's holding was merely by looking at the proposal itself. The motion judge had not heard evidence or testimony as to zoning or city council approval. Her conclusion was a preliminary conclusion because she stated she would allow testimony as to highest and best use and value at that highest and best use and testimony as to the specific sign lease proposal if it was in accordance with Federal Rules 703 and 705, (T44, App. E, infra, 47a, lines 17-24 & 1-5) . The essence of the motion judge and trial court's holding the income to be speculative should have rested on evidence or testimony whether the property could reasonably be used for sign not on the proposal itself which the motion judge held to be subject to contingencies, (Aplee Br. p. 18). The appellate court disagreed not only by looking at the proposal but it also looked to the evidence to determine if the property could reasonably be used for sign. The

uncontradicted testimony was that it could, (Aplee br. p. 34-40). The emphasis of the Illinois Supreme court should not have been on the motion judges review of the document to hold the income speculative but should have been directed to evidence or testimony addressing whether the experts conclusion that the property could be so used was reasonable and based upon reliable data. If it was not available for that use the income would be speculative. The testimony as to zoning and city council approval that it could so be used was uncontested. The record at trial was the basis for the appellate court's finding. The fact that the motion judge found the proposal not an offer is not significant in that the offer as the appellate court noted should only have been introduced for the purpose of highest and best use. The proposal does not place a value on the income stream. It merely shows a demand for the property and the rent offered. It certainly has no prejudicial effect on the ultimate issue. An inadmissible document does not make rent speculative. The appellate court not only looked to the proposal but to the trial record which contained evidence and testimony when it found that the holding of the sign income to be speculative was against the manifest weight of the evidence.

Petitioner's expert relied upon the proposal only after having made the determination that said rental was indicative of market and that the property could be used for sign. He checked the zoning and investigated similar sign lease approvals. He determined that zoning and City Counsel approval were not a problem. Mr. Engel testified that he had spoken with the writer of the proposal and was informed that he terms were reasonable as to rental and that its achievement was reasonably assumable (T251). He had determined that the use of the property for illuminated sign was feasible (T237) and such use would conform to the zoning and electrical sign ordinance. He testified he had discussed zoning compliance with a member of the zoning board (T269).

The prejudicial trial outcome was caused by the trial judge's failure to allow testimony as to rental income from comparable signs so that same could be valued. This ruling contravenes established eminent domain law. Judge Conrad specifically provided as set forth in the

transcript of her decision that she would allow testimony as to Petitioner's theory of highest and best use and testimony as to value at the property's highest and best use.

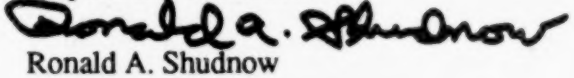
Petitioner's expert's uncontested and reliable testimony that the property could be used for sign made the exclusion by Judge Walsh under Federal Rule 703 improper and an abuse of discretion. The rental income wasn't speculative if zoning and city counsel approval was not a problem. Judge Conrad did not know these facts nor did judge Walsh at the time of their pre trial rulings. But at trial, uncontested evidence was adduced that zoning and city council approval was not a problem.

The appellate court ruled that the rental income was not speculative because the testimony adduced at trial made the motion judge's tentative ruling and the trial court's ruling against the manifest weight of the evidence. The Illinois Supreme Court's decision on this issue is improper because if the property can be used for sign and if the market rentals from sign is the type of data that is reasonably relied on, the Appellate court's decision should be upheld.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that Question 3 is presented herein, not as a reason for granting certiorari, but because in the posture of this case this is the only opportunity for petitioner to seek review of the ultimate ruling.

Respectfully submitted,



Ronald A. Shudnow
77 W. Washington Street
Suite 1620
Chicago, Illinois 60602
(312) 641-6205
Counsel of Record

August 13, 1990

APPENDIX

APPENDIX A

Supreme Court Opinion and Order

NO. 67753

IN THE
SUPREME COURT OF ILLINOIS

CITY OF CHICAGO, A Municipal Corporation,
Plaintiff-Appellant

vs.

HOWARD A. ANTHONY,
Defendant-Appellee

Appeal from the Appellate Court of
Illinois, First Judicial District, Third Division, No. 87-2203.
There Heard on Appeal from the Circuit Court of
Cook County, County Department, Law Division, No. 85 L 50166,
The Honorable ALFRED T. WALSH, Judge Presiding.

Entered: March 29, 1990

JUSTICE CALVO delivered the opinion of the court:

On February 21,1985, plaintiff, City of Chicago, filed a complaint in the circuit court of Cook County to con- demn a parcel of land owned by defendant, Howard A. Anthony. A jury returned a verdict in the amount of $10,910, and the circuit court entered judgment on the verdict. Defendant appealed, and the appellate court reversed and remanded for a new trial (174 Ill. App. 3d 288). This court allowed plaintiff's petition for leave to appeal. Amicus curiae briefs were accepted from the Lake County Forest Preserve District and the Du Page County Forest Preserve District.

The triangular parcel of land sought to be taken in the condemnation proceeding is commonly known as 300 S. Hermitage, 1735 W. Jackson Boulevard and 1757 W. Ogden Avenue in Chicago. At the time of the condemnation, the parcel was improved with a two-story, masonry- constructed commercial retail store building with residential apartments on the second floor. The building was vacant. Subsequent to the filing of the complaint, the building was demolished. The parcel is located in the vicinity of the Eisenhower Expressway.

Nine days before plaintiff filed its complaint, defend- ant received a letter, dated February 12, 1985, from Jeffrey J. Berg, real estate manager for Outdoor Media, Inc. The letter was entitled "Re: Sign Lease Proposal. The proposal concerned leasing approximately 48 inches of ground space for an illuminated advertising sign with visibility from the Eisenhower Expressway. The proposal contained the dimensions of the proposed sign, as well as proposed monthly

rental payments for a 15-year lease which totaled $93,600. The proposal concluded, "I shall phone your office next week for your thoughts * **."

In an eminent domain case, the only question for a jury to decide is the just compensation to be paid to the owner of the property sought to be condemned. (Sanitary District v. Johnson (1931), 343 Ill. 11, 16.) Just compensation is the fair cash market value of the subject property at its highest and best use on the date of the filing of the complaint to condemn. (Department Pub- lic Works & Buildings v. An Association of Franciscan Fathers (1977), 69 Ill. 2d 308, 314.) It is provided by statute:

"[T]he fair cash market value of property in a proceeding in eminent domain shall be the amount of money which a purchaser, willing but not obligated to buy the property, would pay to an owner willing but not obliged to sell in a voluntary sale, which amount of money shall be determined and ascertained as of the date of filing the complaint to condemn." Ill. Rev. Stat. 1983, ch. 110, par. 7—121.

The highest and best use may be the present use to which the property is actually put or:

"any capacity for future use which may be anticipated with reasonable certainty, though dependent upon circumstances which may possibly never occur, *** if it in fact enhanced the market value of the land in its present condition and state of improvement. The future prospective use affecting value must be a present capacity for a use which may be anticipated with reasonable certainty and made the basis of an intelligent estimate of value." Crystal Lake Park District v. Consumers Co. (1924), 313 111. 395, 406.

At trial? defendant's expert valuation witness, Donald Engel, was not permitted to testify concerning the dollar amount of the rental income contained in the sign lease proposal. Mr. Engel was also prohibited from testifying about the rental income received from

sign lease agreements on other properties. The appellate court reversed, holding that under Federal Rule of Evidence 703 and Federal Rule of Evidence 705, defendant's expert should have been able to so testify.

Rule 703 provides:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Fed. R. Evid. 703.

Rule 705 provides:

"The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Fed. R. Evid. 705.

Rules 703 and 705 were adopted by this court in Wilson v. Clark (1981), 84 Ill. 2d 186.

On November 25, 1985, plaintiff filed a motion in limine to exclude from the trial any testimony or evidence relating to the sign lease proposal, including any testimony which concerned the appraised value of the sign lease proposal and any testimony which valued the sign lease proposal separately from the value of the land or which considered future rental income from the sign lease proposal.

Defendant filed a response to plaintiff's motion in limine, and a hearing was held on December 10, 1985. On December 20, 1985, a judge (hereafter referred to as the motion judge) ruled on the motion. The motion judge found the property must be valued as a whole, and

a lease may not be separately valued as one part to be added to another part. This ruling is consistent with the unit rule of valuation in eminent domain cases, which requires that property be valued as a whole. Because the "measure of recovery for damage to private property caused by a public improvement is the loss which concerns the property itself *** the fair market value of improved property is not the sum of the value of the building and the value of the land computed separately." (Department of Public Works & Buildings v. Lotta (1963), 27 Ill. 2d 455, 456.) The unit rule is applied in eminent domain cases to avoid misleading the jury.

Concerning the admissibility of the sign lease proposal, the motion judge stated her findings: (1) the document was not an offer to purchase the property for cash; (2) the document was not an actual lease, (3) the document was an initial contact letter setting forth a proposed business opportunity; and (4) "the rental income set forth in the document is contingent upon not only both parties agreeing to enter into a leasing agreement, but to the proposed advertising, means, zoning ordinances and receiving City Council clearance." The motion judge specifically found the proposed rental income to be "speculative and certainly futuristic." The judge found the document would tend to confuse the issue of highest and best use, would be prejudicial, and would have the danger of being misunderstood by the jury. The judge ruled the document was inadmissible.

Concerning the use of the sign lease proposal for the purpose of supporting defendant's theory of highest and best use, the motion judge ruled, "The Court will allow testimony related to the specific sign lease proposal which would be acceptable under Federal Rules of Evidence, 703 and 705, which were adopted by the Illinois Supreme Court in 1981 in Wilson v. Clark ***. And also in Department of Transportation v. Charles Beeson ." The judge also stated:

"Nothing in this order shall be considered a ruling that otherwise

inadmissible evidence will be admitted for all purposes through the testimony of the expert evaluation witnesses, and the Court shall instruct the jury on that. You will see the impact of that after you read the Beeson case."

This ruling was followed by several requests for clarification by counsel for both plaintiff and defendant. The motion judge explained that defendant's expert would be able to testify that in his opinion the subject property has its highest and best use in sign lease advertising. The expert could be asked the basis of his opinion and would be able to say "that there were offers with regard to a sign lease being put on and that was received before, according to the Federal Rules, we are going to be able to get into various things with regard to that sign lease proposal. He's going to be able to say that that was a factor in his consideration of what was the highest and best use." After another request for clarification, the motion judge said the specifics of the rental income contained in the proposal would not be admissible, but defendant's expert "can say that he took into consideration that there would be a rental income that is produced by that property."

The motion judge again clarified her ruling regarding the sign lease proposal, saying the document would be excluded from evidence, but "[t]estimony relating to the document, if it is within 703 and 705, I have no choice but to allow it in that limited context if it fits within the Federal Rules *** unless at a future time at the pretrial you can somehow say that my interpretation of this with regard to the rental income is wrong." The judge also noted, "If we have any further problem with this when you have developed the case, we will be able to decide all of this at pretrial." The judge directed that an order be drafted, noting the order could read that the motion is "half denied and half not denied. But you can work that out by attaching a copy of that transcript to the order. "

Plaintiff drafted an order which was signed by the motion judge on January 22, 1986, the same day the case was transferred to

another judge (hereafter referred to as the trial judge). Among the conclusions of law, the order stated:

"5. The document entitled sign lease proposal is hereby excluded and shall not be admitted into evidence. The introduction of the document would tend to confuse and prejudice the jury.

6. Federal Rules of Evidence 703 and 705, adopted by the Illinois Supreme Court in Wilson v. Clark., [sic] 84 Ill. 2d 186, will be deemed to apply in this cause."

The motion judge then added to conclusion 6, by hand, "as defined in Dept of Transportation v. Beeson, 137 Ill App 3[d] 908." The order continued:

"a. The document entitled Sign Lease Proposal is inadmissible as evidence in the trial of this cause.

b. Testimony which separately values the proposed sign lease hold is inadmissible as evidence in the trial of this cause.

c. Testimony regarding future rental income to be derived from the sign lease proposal is inadmissible as evidence in the trial of this cause.

d. Within the limited context of testimony regarding highest and best uses of the subject property, testimony of experts who may have considered the sign lease proposal as a factor in reaching a determination of highest and best use of the property may be allowed; however, nothing in this order shall be considered a ruling that otherwise inadmissible evidence will be admitted for all purposes through the testimony of an expert valuation witness, and the Court will so instruct the jury."

The judge then added by hand: "e. [T]he transcript of proceedings is attached hereto." Defendant filed a motion to vacate and/or

modify the motion judge's ruling of January 22,1986, which was denied.

Plaintiff later deposed defendant's expert valuation witness, Don Engel. Mr. Engel's appraisal report and his testimony during the deposition disclosed he had considered future rental income from the sign lease proposal in reaching his opinion of the fair cash market value of the defendant's property. Plaintiff filed another motion in limine on June 12, 1986, requesting that Mr. Engel be barred from testifying to an opinion of value which was based in part on future rental income previously held to be inadmissible.

At the hearing on plaintiff's motion, the trial judge noted the sign lease proposal "had been gone over and over" at least four or five times. At issue was the interpretation of the trial judge's ruling regarding the admissibility of the sign lease proposal. Plaintiff asked the trial judge for the relief which, in plaintiff's interpretation, the motion judge had already granted: an order barring any testimony concerning future rental income from the sign lease proposal.

The trial judge entered an order which read:

"1. Defendant's expert may express an opinion of value and if asked on direct examination what facts or underlying data did the appraiser take into consideration in making his opinion, he will not be allowed to testify as to income as set forth in the sign lease proposal.

2. This does not prohibit Defendant's appraiser from testifying about other facts or underlying data of the type which is usually relied upon by appraisers including other sign income in formulating an opinion of value. "

At trial, two experts testified for plaintiff. Ripley Mead, Jr., a licensed real estate broker and appraiser, was retained by plaintiff to appraise the subject parcel in 1983. Mr. Mead testified only to the physical condition of the property: in his opinion, the overall

condition of the building was poor. Mr. Mead did not express an opinion of value.

Sylvester Kerwin, a real estate broker and appraiser, was retained by plaintiff in December 1985 to value the property as of the condemnation date, February 21, 1985. The building had been razed before Mr. Kerwin was so retained. Mr. Kerwin was familiar with the exterior of the building from earlier inspections of other buildings in the area; he also inspected public assessment records in order to determine the size, shape and condition of the property.

In Mr. Kerwin's opinion, the highest and best use of the subject property would be to raze the building and develop the property commercially by assembling the property with surrounding parcels. According to Mr. Kerwin, the fair cash market value of the property was $8,700: 2,183 square feet valued at $4 per square foot. Mr. Kerwin considered four or five sales of commercial properties, which in his opinion were comparable, in reaching his opinion of the fair cash market value of the property. In order to relate the sale of these properties to the subject property, Mr. Kerwin made adjustments for location, traffic flow, size and time of sale.

According to Mr. Kerwin, the use of the property for sign leasing under the sign lease proposal "was not reasonably probable as of the date of the evaluation." Mr. Kerwin considered such a use to be speculative. During cross-examination, Mr. Kerwin stated he did not recall the specific zoning requirements regarding illuminated signs.

At trial, defendant testified he purchased the subject property for $7,500 on August 19, 1981. There was space for three commercial stores on the first floor of the building, and three apartments, consisting of 13 rooms, on the second floor. The land area of the property was 2,180 square feet. The building was 3,980 square feet. Defendant testified the property was in good condition. Defendant bought the property with the intention of "rehabbing" it. Defendant estimated the cost of rehabilitating the building to be between

$7,000 and $20,000. Defendant never received any income from the property.

Mr. Engel, a real estate appraiser, testified as an expert witness for defendant. It was Mr. Engel's opinion that the highest and best use of the property would be its "rehabilitation or reconstruction for commercial uses *** and its availability for sign lease use and income to be generated from that source." Mr. Engel stated that he took into consideration his experience in estimating in determining the cost of rehabilitating the building. Mr. Engel examined the zoning ordinances of the City of Chicago as they related to illuminated signs to determine the feasibility of defendant's property being legally used for an illuminated sign. Mr. Engel also investigated land sales in the area.

Mr. Engel's opinion of the value of the subject property on February 21, 1985, was $55,000. Mr. Engel testified he took into consideration the value of the underlying land, the value of the then existing building structure in its condition at that point in time, and the value of the potential rental income from leasing an advertising sign. Mr. Engel testified that in arriving at a final estimate of the fair cash market value of the subject property, he took the value of the subject property as a whole and the influence of each factor on its value. Concerning the potential income from sign leasing purposes, Mr. Engel testified he examined the sign lease proposal itself and spoke with the signer of the letter. Furthermore, Mr. Engel testified he spoke with other individuals in the business of negotiating sign leases and reached the conclusion that the proposal was a reasonable rental for this location and its achievement was reasonably probable.

An objection was sustained by the circuit court to Mr. Engel's testimony regarding the general market on outdoor advertising signs. The circuit court also sustained an objection to Mr. Engel's testimony concerning the market rentals for similar properties which might disclose an average dollar amount paid for similar signs.

When defendant requested to make an offer of proof, the circuit court informed defendant an offer of proof would be allowed at the close of the evidence. The circuit court also excluded from evidence certain journals of proceedings of the city council, and evidence of the number of sign permit requests made by a certain sign leasing company.

At the close of the evidence, during the offer of proof, defendant's counsel explained that Mr. Engel would have testified concerning the official indexes of the City of Chicago for the years 1982-85. From those indexes, Mr. Engel had counted the applications for illuminated sign approvals which had been submitted to the joint committee on building and zoning. Specifically, Mr. Engel would have testified to the exact number of applications from specific sign leasing companies and the number which had been approved. At this point, the judge instructed defense counsel to continue making his offer of proof, and to come to his chambers when the offer of proof was completed. The judge then left the courtroom.

The remainder of the offer of proof concerned the specifics of the sign lease proposal about which defendant had wanted Mr. Engel to testify, and the research performed by Mr. Engel concerning the average rental income for advertising signs in the market. Furthermore, Mr. Engel would have testified that the proposed sign income was the type of fact reasonably relied upon by experts in the field in reaching a conclusion of the value of the property. Finally, Mr. Engel would have testified that there was an absence of actual sales of properties with similar signs in the area, and Outdoor Media had the financial ability to fulfill the terms of the proposal for the sign lease.

Defendant appealed. The appellate court reversed the judgment of the circuit court and remanded the cause for a new trial. The appellate court found the excluded testimony of defendant's expert, Mr. Engel, regarding the value of the sign income reflected in the proposed sign lease, to clearly come within that allowable under

Federal Rules of Evidence 703 and 705. As such, the appellate court concluded it was error to prohibit defendant's expert from testifying about the sign lease proposal. The appellate court held the circuit court's finding that the rental income from the sign lease proposal was "speculative" and "futuristic" to be contrary to the weight of the evidence.

Further, relying on Department of Transportation v. Beeson (1985), 137 Ill. App. 3d 908, the appellate court found "defendant's expert should have been allowed to testify as to an average rental income for other signs, insofar as defendant's expert took into account potential sign rental income in determining the value of the subject property." (174 Ill. App. 3d at 298.) The appellate court noted testimony concerning the market rental income from other similar signs would serve to "shed light upon the basis for the expert's opinion regarding the value of the rental income contained in the sign lease proposal." 174 Ill. App. 3d at 298.

In Beeson, the appellate court held that Rules 703 and 705 "should be applied to the testimony of valuation witnesses, with the result being that all sales considered by valuation witnesses now are admissible" in eminent domain cases. (Beeson, 137 Ill. App. 3d at 910.) In the instant case, the appellate court found Beeson distinguishable "in that Beeson involved the admissibility of comparable sales of properties, while the instant appeal involves the admissibility of comparable uses of property for sign leasing and the income generated therefrom." (Emphasis in original.) (174 Ill. App. 3d at 298.) The appellate court found the analysis in Beeson helpful since Beeson considered the rationale behind Rules 703 and 705.

For the reasons expressed below, we reverse the appellate court and affirm the judgment of the circuit court. We agree that Rules 703 and 705, as adopted by this court in Wilson, apply to a qualified expert witness who expresses an opinion of the fair cash market value of a piece of property in an eminent domain case. Rule 703 was intended to "bring the judicial practice into line with the practice

of the experts themselves when not in court." (Fed. R. Evid. 703, Advisory Committee's Note.) The advisory committee's note to Rule 703 also states: "If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data 'be of a type reasonably relied upon by experts in the particular field.' " Fed. R. Evid. 703, Advisory Committee's Note.

Rule 703 did not create an exception to the hearsay rule; the underlying facts or data upon which an expert in a particular field is found to have reasonably relied are not admitted for their truth. The underlying facts or data are admitted "for the limited purpose of explaining the basis for the expert witness' opinion." (People v. Anderson (1986), 113 Ill. 2d 1, 12.) Even though the facts or data underlying an expert's opinion are not offered for their truth, a "key element in applying Federal Rule 703 is whether the information upon which the expert bases his opinion is of a type that is reliable." (Wilson, 84 Ill. 2d at 193.) This court has stated a trial judge need not allow an expert to state the underlying facts or data of his opinion "when [their] probative value in explaining the expert's opinion pale[ ] beside [their] likely prejudicial impact or [their] tendency to create confusion." Anderson, 113 Ill. 2d at 12.

Other courts have indicated that it is for the circuit court, in the exercise of its discretion, to determine whether the underlying facts or data upon which an expert bases an opinion are of a type reasonably relied upon by experts in the particular field. (In re "Agent Orange" Product Liability Litigation (E.D.N.Y. 1985), 611 F. Supp. 1223, 1243, affd (2d Cir. 1987), 818 F.2d 187; Greenwood Utilities Comm'n v. Mississippi Power Co. (5th Cir. 1985), 751 F.2d 1484, 1494; Barrel of Fun, Inc. v. State Farm Fire & Casualty Co. (5th Cir. 1984), 739 F.2d 1028, 1033; Soden v. Freightliner Corp. (5th Cir. 1983), 714 F.2d 498, 502; Bauman v. Centex Corp. (5th Cir. 1980), 611 F.2d 1115, 1120; Merit Motors, Inc. v. Chrysler Corp. (D.C. Cir. 1977), 569 F.2d 666, 673; see J. Weinstein & M. Berger, Weinstein's Evidence, par. 703(03), at 703—16 (1988).) In

Soden, the court noted that such inquiry into whether the basis for the expert's opinion meets this standard must be made on a case-by-case basis and should "focus on the reliability of the opinion and its foundation rather than merely on the fact that it was based *** upon hearsay." Soden, 714 F.2d at 503.

We hold that it is for the circuit court, in the exercise of its discretion, to determine whether the underlying facts or data upon which an expert bases an opinion are of a type reasonably relied upon by experts in the particular field. Such a determination shall not be disturbed unless there has been an abuse of discretion.

The opinion of an expert that the underlying facts or data upon which he or she seeks to base an opinion are of a type reasonably relied upon by experts in the particular field is a factor to be considered by a circuit court in the exercise of its discretion. This, however, does not allow the circuit court to "abdicate its independent responsibilities to decide if the bases meet minimum standards of reliability as a condition of admissibility." In re "Agent Orange", 611 F. Supp. at 1245.

The reason for the substantive inadmissibility of the facts or data upon which an expert relies must be considered by the circuit court. If another rule of law applicable to the case excludes the information sought to be relied upon by the expert, the information may not be permitted to come before the jury under the guise of a basis for the opinion of the expert.

As stated by the court in Barrel of Fun:

"[U]nder Rule 703, expert testimony may not be excluded merely because it is based on facts or data that are inadmissible in evidence. However, the Rule does not guarantee the admissibility of all expert testimony that meets its criteria if such testimony runs afoul of other evidentiary requirements. For instance, expert testimony otherwise admissible under Rules 702 and 703 may still be excluded 'if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ....' Fed. R. Evid. 403." Barrel of Fun, 739 F.2d at 1033.

In this case, it is eminent domain law which controls the admissibility of evidence for its truth as well as for the limited purpose of explaining the basis for an expert's opinion pursuant to Rule 703. Because each piece of property is unique, each condemnation case depends upon the facts and circumstances of the particular case. Except for condemnation cases which announce general principles of eminent domain law, it has been noted that precedents may be of little assistance in arriving at the fair cash market value to be paid in each case. (City of Chicago v. Lord (1916), 276 Ill. 544, 550.) Because no blanket rule of eminent domain law will be applicable in every condemnation case, "[t]he limits of the evidence necessarily rest largely in the discretion of the trial judge." Forest Preserve District v. Wing (1922), 305 Ill. 194; Chicago & Western Indiana R.R. Co. v. Heidenreich (1912), 254 Ill. 231, 238.

The determination of the proper factors which may be taken into consideration in determining just compensation must be determined by the trial court as a question of law. (Johnson, 343 Ill. at 16.) An expert in valuation of property for condemnation purposes may only rely upon facts or data which are legally relevant to the issue of the fair cash market value of the property in question. To the extent that an expert relies upon facts or data which are irrelevant to proving the fair cash market value of the property in question, then the facts or data so relied upon would not be based upon lawful elements of damage and would be of no benefit to a jury. Illinois Power & Light Corp. v. Talbott (1926), 321 Ill. 538, 544.

The parties have not directed our attention to any case comparable to the case at bar. Defendant argues his valuation expert should have been allowed to testify about the specifics of the proposed rental income set forth in the sign lease proposal as a partial basis for the

expert's opinion of the fair cash market value of the subject property. Further, defendant argues his expert should have been permitted to testify about the market rental for similar signs. According to defendant, he was prevented from setting forth the basis of his opinion of the fair cash market value of the subject property.

Defendant argues that the sign lease proposal, as an offer to lease part of his property for sign advertising purposes, should be treated under the law of eminent domain as an offer to purchase property for cash. We disagree. Bona fide offers to purchase property for cash by persons able to buy, in the absence of evidence of comparable sales, have been held to be some evidence of the fair cash market value of property in condemnation cases. (Department of Public Works & Buildings v. Lambert (1952), 411 Ill. 183, 191.) In order for an offer to be bona fide, it must "be made in good faith, by a [person] of good judgment, acquainted with the value of real estate and of sufficient ability to pay. It must be for cash and not for credit or in exchange and it must be determined whether made with reference to the fair cash market value of the property or to supply a particular need or fancy." (City of Chicago v. Harrison-Halsted Building Corp. (1957), 11 Ill. 2d 431, 438.) The question whether an offer to purchase is bona fide is a preliminary question to be determined by the trial court in the exercise of its discretion, and will not be disturbed unless it is manifestly against the weight of the evidence. Lambert, 411 Ill. at 191; Harrison-Halsted, 11 Ill. 2d at 438.

In this case, the circuit court, in the exercise of its discretion, found the sign lease proposal to be an initial contact letter setting forth a proposed business activity. The circuit court determined that the contingencies to which the sign lease proposal was subject included compliance with zoning ordinances and receipt of city council approval, as well as agreement of the parties. Because the sign lease proposal was not even an offer to lease, any analogy to an offer to purchase fails. The finding by the circuit court that the proposed rental income was speculative was not, on this record, against the weight of the evidence, and the appellate court erred in

reversing this finding of fact by the circuit court.

The circuit court did not abuse its discretion in prohibiting defendant's expert from testifying about the proposed future rental income in the initial contact letter setting forth a proposed business activity because such a proposal is not relevant to the fair cash market value of a piece of property in a condemnation case; it is not a competent factor upon which an expert may reasonably rely in forming an opinion of fair cash market value. The exclusion of the particulars of the document did not violate Rule 703, and the appellate court erred in so holding.

Defendant also argues his valuation expert should not have been precluded from testifying about the average sign rental income from properties other than the subject property. The trial judge's order did not prohibit defendant's expert from "testifying about other facts or underlying data of the type which is usually relied upon by appraisers including other sign income in formulating an opinion of value." Defendant's expert was, however, prohibited from so testifying, and the appellate court, relying on Beeson, found this to be error "insofar as defendant's expert took into account potential sign rental income in determining the value of the subject property." The appellate court also found that the average sign rental income of other properties should be admissible "since it would aid the jury in a determination of the fair cash market value of the property for its highest and best use." 174 Ill. App. 3d at 299.

The appellate court in Beeson held Rules 703 and 705 applicable to the testimony of expert witnesses in eminent domain cases. Beeson held that Rule 703 and Rule 705 apply to the testimony of valuation witnesses, "with the result being that all sales considered by valuation witnesses now are admissible." (Beeson, 137 Ill. App. 3d at 910.) The Beeson court "believe[d] that Federal Rules of Evidence 703 and 705 should be applied to the valuation testimony of comparable sales." (Beeson, 137 Ill. App. 3d at 911-12.) The disputed testimony in Beeson concerned evidence of the dollar

amounts of comparable sales considered by the defendant's valuation witnesses.

The Beeson court indicated that Wilson "altered the rule of judicial discretion in the admissibility of comparable sales." (Beeson, 137 Ill. App. 3d at 910.) We do not agree; Rule 703 and Rule 705 allow for an expert to express an opinion based on facts or data not admissible in evidence only if the facts or data are of a type reasonably relied upon by experts in the particular field, and are not excluded by another rule of law or a competing policy interest.

In an eminent domain case, in order for facts or data to be reasonably relied upon by an expert in reaching an opinion of the fair cash market value of the property sought to be condemned, the facts or data must be legally relevant. Under the eminent domain law of this State, there may be circumstances where an expert may be permitted to state the particulars of a rental agreement as a basis for an opinion of fair cash market value. (See Department of Public Works & Buildings v. Kirkendall (1953), 415 Ill. 214, 223.) Each eminent domain case, however, must be decided on its facts. Even if it might be proper, under the appropriate circumstances, to allow an expert to testify about the average sign rental income received on comparable properties in a condemnation case as an underlying fact or data upon which the expert relied in reaching an opinion of the fair cash market value of the subject property, such circumstances are not present here. The circuit court correctly prohibited defendant's expert from stating the specifics of the rental income contained in the sign lease proposal as a basis for his opinion of the fair cash market value of the subject property. As a result, the actual dollar amounts of income received pursuant to other sign leasing agreements on other parcels of property would not serve to "shed light" upon the basis for the expert's opinion regarding rental income set out in the sign lease proposal.

Defendant contends the rulings by the circuit court prohibited him from conveying his theory of the highest and best use of his property

to the jury. We disagree. Defendant was able to put before the jury his theory of highest and best use: the rehabilitation or reconstruction of the building for commercial uses and the availability of the subject property for sign lease use and income to be generated from that source. Defendant's expert testified he had examined a sign lease proposal and spoke to the signer of the letter. Defendant's expert testified that the sign lease proposal was a factor in his consideration of the highest and best use of the subject property. Defendant's expert testified in detail about the zoning requirements applicable to illuminated signs, and opined that the achievement of using the subject property for advertising sign lease purposes was reasonably probable.

Defendant's expert specifically stated his opinion of value of the subject property, $55,000, was based on a combination of the following factors: the value of the underlying land, the value of the then existing building structure, and the value of the potential income from sign leasing purposes. It was not error to exclude the sign lease proposal itself, or the particulars of the proposed rental income referred to therein. Neither was it error to exclude the average rental income from other properties. The jury award of $10,910 was within the range of the evidence.

For the foregoing reasons, we reverse the judgment of the appellate court and affirm the judgment of the circuit court.

Appellate court
judgment reversed;

circuit court
judgment affirmed.

APPENDIX B

Appellate Court Opinion and Order

NO. 87-2203

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CITY OF CHICAGO, A Municipal Corporation,
Plaintiff-Appellee

vs.

HOWARD A. ANTHONY,
Defendant-Appellant

Appeal from the Circuit Court of Cook County
Illinois, County Department Law Division.
No. 85 L 50166,
The Honorable ALFRED T. WALSH, Judge Presiding.

Entered: August 24, 1988

THE CITY OF CHICAGO, Plaintiff-Appellee,

v.

HOWARD A.ANTHONY, Defendant-Appellant

No. 87-2203

Appellate Court of Illinois, First District, Third Division

174 Ill. App. 3d 288; 528 N.E.2d 298; 1988 Ill. App. LEXIS 1266; 123 Ill. Dec. 753

August 24, 1988

Appeal from the Circuit Court of Cook County; the Hon. Alfred T. Walsh, Judge, presiding

Ronald A. Shudnow, of Chicago, for appellant.

Judson H. Miner, Corporation Counsel, of Chicago (Ruth M. Moscovitch and Frederick S. Rhine, Assistant Corporation Counsel, of counsel), for appellee.

FREEMAN

JUSTICE FREEMAN delivered the opinion of the court:

A jury in a condemnation proceeding under the Eminent Domain Act (Ill. Rev. Stat. 1985, ch. 110, par. 7 -- 101 et seq.) returned a verdict awarding defendant, Howard A. Anthony (Anthony), $10,910 as full compensation for land taken by plaintiff, the City of Chicago (City), on February 25, 1985.

Defendant appeals and raises the following contentions: (1) defendant's expert should have been allowed to testify on direct examination regarding sign income offered to defendant under a sign lease proposal; (2) the trial court erred by not allowing defendant's expert to testify regarding other sign income for rental of comparable signs; (3) the verdict regarding just compensation was contrary to the manifest weight of the evidence, against the preponderance of the evidence, and unreasonable and arbitrary; (4) the closing argument [*2] of plaintiff's counsel was prejudicial to defendant, and the trial court erred in overruling defendant's objection to counsel's misstatements of law and fact; (5) the sign lease proposal provided to defendant was a bona fide offer and should have been admitted into evidence as it corroborates a multiple use of the subject property; (6) the trial court improperly failed to exercise its power to correct the jury verdict, and defendant is entitled to an additur to increase the judgment; (7) the trial court erred in failing to allow into evidence a copy of the zoning ordinance and related documents; and (8) the trial judge erred by absenting himself from an offer of proof made by defendant's attorney.

For the reasons stated below, we reverse the judgment of the circuit court and remand this matter for a new trial.

The real estate involved in this appeal is commonly known as 300 South Hermitage Avenue, 1735 West Jackson Boulevard, and 1757 West Ogden Avenue. Anthony was the owner of the land prior to the condemnation action. The land is triangular in shape, with approximately 57 feet of frontage along the easterly side of Ogden Avenue, 15 1/2 feet of frontage along the southerly [*3] side of Jackson Boulevard, and 56 feet of frontage along the westerly side of Hermitage Avenue. The site covers approximately 2,182 square feet. The property is zoned C1-3 for restricted commercial use. At the time of condemnation, a two-story brick building stood on the land.

Prior to trial, on November 25, 1985, the City filed a motion in

limine seeking to exclude from trial any testimony or other evidence relating to a sign lease proposal purportedly received by defendant on February 12, 1985, nine days before commencement of the condemnation action. The proposal, submitted by Outdoor Media, Inc., concerned the leasing of space on the subject property for the erection of an illuminated electrical sign with a face measuring 20 feet by 60 feet. The proposal was for a 15-year lease, with monthly rental payments of $433 during the first three years, increasing to $625 for the last three years, for a total of $93,600 over the course of the leasehold. The proposed leasehold was for 48 inches of ground area.

On January 22, 1986, a hearing was held on the motion in limine before Judge Mary Conrad. Judge Conrad entered an order which incorporates the transcript [*4] of proceedings from the hearing on the motion. The court made the following findings of fact: the sign lease proposal is not an actual lease nor a bona fide offer to purchase the property; the document is an initial contract letter setting forth a proposed business opportunity; the proposed rental income is not only contingent upon agreement of the parties but is further subject to various contingencies, including compliance with the zoning ordinances and receipt of city council approval, and accordingly, the rental income is "speculative and certainly futuristic."

Judge Conrad also entered the following conclusions of law: the subject property must be valued as a whole, since a leasehold interest may not be valued separately and added to other estimates of value to form an opinion as to the value of the whole property; the document entitled "sign lease proposal" will not be allowed into evidence, as its introduction would tend to confuse and prejudice the jury; and Federal Rules of Evidence 703 and 705, adopted by the Illinois Supreme Court in Wilson v. Clark (1981), 84 Ill. 2d 186, 417 N.E.2d 1322, cert. denied (1981), 454 U.S. 836, 70 L. Ed. 2d 117, 102 S. Ct. 140, [*5] and as defined in Department of Transportation v. Beeson (1985), 137 Ill. App. 3d 908, 485 N.E.2d 511, apply to this case.

The order accordingly mandated that the sign lease proposal was inadmissible as evidence at trial; testimony which separately valued the proposed sign lease was inadmissible as evidence; and testimony regarding future rental income to be derived from the sign lease proposal was inadmissible. The order further mandated:

"Within the limited context of testimony regarding highest and best uses of the subject property, testimony of experts who may have considered the sign lease proposal as a factor in reaching a determination of highest and best use of the property may be allowed; however, nothing in this order shall be considered a ruling that otherwise inadmissible evidence will be admitted for all purposes through the testimony of an expert valuation witness, and the Court will so instruct the jury."

The case was reassigned to Judge Alfred T. Walsh on January 22, 1986. On June 12, 1986, after taking the deposition of Donald Engel, defendant's valuation expert, the City filed another motion in limine. By its motion, the City sought to bar testimony [*6] from Engel regarding the sign lease proposal which had been ruled inadmissible. On July 28, 1986, Judge Walsh entered an order providing, in pertinent part:

"1. Defendant's expert may express an opinion of value and if asked on direct examination what facts or underlying data did the appraiser take into consideration in making his opinion, he will not be allowed to testify as to income as set forth in the sign lease proposal.

2. This does not prohibit Defendant's appraiser from testifying about other facts or underlying data of the type which is usually relied upon by appraisers including other sign income in formulating an opinion of value."

At trial the City called two appraisers as expert witnesses. Ripley

Mead, Jr., a licensed real estate broker and appraiser, was retained by the City to appraise the subject property in 1983. Pursuant to a motion in limine granted by the court, however, Mead was called to testify only to the physical condition of the property and not to estimate its value. Mead stated that he examined the exterior of the building on the property, but did not examine the interior. Mead stated he did not enter the building since there was [*7] a sign reading "Do not enter" and due to the building's physical condition. Mead testified that the overall condition of the building was poor.

The City's second expert witness was Sylvester Kerwin, a Member of the Appraisal Institute (MAI), a real estate appraiser and real estate broker. The City retained Kerwin in December 1985 to value the property as of the February 21, 1985, condemnation date. The building on the property was razed some time between February 21, 1985, and the date when Kerwin was called to value the property. Kerwin did not contact defendant regarding the condition of the property as of the condemnation date. Kerwin relied on his prior appraisal experience in the area near the subject property during May and November 1984 and his inspection of the public assessment records to determine the size, shape, and condition of the property.

Kerwin did not inspect the interior of the building, although he stated he was familiar with the exterior from his earlier appraisals of other buildings in the area. Kerwin stated that in making an appraisal, one first determines the highest and best use for the property and then fixes value in relation to the highest and best [*8] use. The highest and best use relates to the motivations of the market in the area.

Kerwin testified that the highest and best use of the subject property would be to raze the building and develop it commercially by assembling it with other surrounding parcels which could be bought up. Due to the size and shape of the parcel, it would be difficult to develop the property commercially without also

assembling surrounding parcels. Kerwin stated that such commercial development might entail the building of a one-story retail outlet such as a 7-11 or White Hen Pantry, perhaps supported by ancillary stores, with space for off-street parking. In forming his opinion as to highest and best use, Kerwin considered the property's physical condition, the size and triangular shape of the parcel, the street frontage for access and exposure, the lack of off-street parking, and surrounding land uses and development trends in the area.

Kerwin found the fair cash market value of the property, as of February 21, 1985, to be $8,700, that is, 2,183 square feet valued at $4 per square foot. Kerwin stated that the building added no contributory value to the land. Further, the size and shape [*9] of the building, in addition to its physical condition (e.g., that windows were boarded) indicated the building had been unoccupied for a number of years before it was razed. Kerwin also testified that, in determining the market value of the subject property, he considered four or five sales of comparable commercial properties. For each sale, he adjusted for location, nearby traffic flow, size, and time of sale, in order to relate the sale to the subject property.

On cross-examination, Kerwin stated he considered the use of the subject property for outdoor advertising in relation to its highest and best use. Kerwin stated that such a use, however, was speculative in that no contract had been entered into; the property owner would have to appear at a zoning hearing to seek approval; the property was within 75 feet of a residential zoning district; and it was unclear whether a sign could be placed on the site itself or would have to be supported physically by the building. Kerwin stated that the use of the property for sign leasing under the sign lease proposal "was not reasonably probable as of the date of evaluation." Kerwin admitted during cross-examination that he did not [*10] recall the specific zoning requirements regarding illuminated signs.

Defendant testified that he purchased the subject property on

August 19, 1981, for $7,500. At the time of purchase, the brick building was vacant and boarded up. The first floor had space for three commercial stores and the second floor contained three apartments comprising 13 rooms. The land area is 2,180 square feet, and the building contained 3,980 square feet. The building had face brick on each side and common brick on the south side.

Defendant purchased the property with the intention of "rehabbing" it. As of February 21, 1985, the date of condemnation, the plumbing, electrical circuitry, roof, masonry, glazing, and carpentry were in good condition, and the overall condition of the building was good. Defendant made some repairs to the building in 1982 and early 1983, but ceased making repairs after February 1, 1983, when City appraiser Ripley Mead informed him that the City was going to take the property. Since the date defendant purchased the property, there was substantial growth in the surrounding area, including the building of multi unit residences and single-family dwellings.

On cross-examination, [*11] defendant admitted that he never received income from the subject property. He also stated that the mortar on the building needed tuckpointing, some of the plaster had washed away and some plaster was broken, and the floor was warped in some parts of the building. Defendant previously told his appraiser, Donald Engel, that he, defendant, estimated the cost of rehabilitating the building would range from $7,000 to $20,000. Defendant planned to do the rehabilitation work himself and therefore did not have any formal estimates for the work.

Defendant's expert witness at trial was Donald Engel, an MAI, a real estate appraiser and real estate broker. Engel was retained in March 1986 to appraise the subject property. Engel first visited the property on March 22, 1986, when the property was a vacant lot. (The building had been razed in 1985.) Before placing a value on the property, Engel spoke to defendant, examined public records of the Cook County assessor, and reviewed photographs of the property

provided by defendant.

In 1985 Engel and his associates appraised 50 to 75 properties in the area surrounding the subject property. Engel described the area around the subject land as [*12] "an older neighborhood on the west side of Chicago, approximately two miles west of the Loop which has been in decline for many years, but which now in the last few years has enjoyed some resurgence of activity with a substantial amount of new development and redevelopment." The "dominant force" in the area is the presence of hospitals, including Presbyterian-St. Luke's, Cook County, and University of Illinois.

Engel testified that "the highest and best use of the [subject] property as of February 21, 1985 would be its rehabilitation or reconstruction for commercial uses to take advantage of the substantial traffic that passes the site daily and its availability for sign lease use and income to be generated from that source." Engel's opinion as to the highest and best use was based on his experience of appraising hundreds of properties of similar character throughout the metropolitan area in order to estimate the expense required for rehabilitation.

Engel also examined the City's zoning ordinances relating to illuminated signs, in order to determine the feasibility of use of the property for sign leasing purposes. He concluded that the property "could be used" for sign purposes [*13] as proposed in the offer to lease received by defendant. Engel also stated that the placing of the sign, as provided in the sign lease proposal, would be permitted under the zoning ordinance. Engel believed that there was a demand for the use of the subject property for sign leasing. Engel's opinion is based on: (1) the "offer," i.e., the sign lease proposal received by defendant, which Engel stated as provided by a "reputable" and "successful" sign leasing company; and (2) the results of a survey by Engel and his associates showing that during the past several years there were substantial numbers of sign approvals along the Eisenhower Expressway near the subject

property.

Engel's opinion of the value of the property as of February 21, 1985, was $55,000. Engel took into account the value of the underlying land, the then-existing improvement, and the potential income from sign leasing purposes. With regard to potential sign lease income, Engel examined the sign lease proposal itself and spoke with the signer of the proposal letter and individuals in the business of negotiating sign leases. Engel determined that the proposal contained a reasonable rental for the [*14] location and that "its achievement was reasonably assumable."

On cross-examination, Engel stated the value of the underlying land was $7,600, and the building added a value of $12,000 to the property. He stated it would be economically feasible to rehabilitate the building, at a cost of approximately $20,000. The building occupied "virtually" the entire site. The sign lease proposal called for erecting a sign on a pole of a four-foot diameter. Engel stated that such a sign could be supported on the property, including on the land itself in the area which the building did not occupy, or by means of running a shaft through the building or on the roof.

After Engel testified, defendant's attorney made an offer of proof regarding what Engel's testimony would have been concerning the following matters to which Engel was not allowed to testify: the contents of the official indexes of the City of Chicago showing applications for illuminated sign approvals submitted to the city council; contents of transcripts from city council meetings regarding such applications; the specific sign income contained in the sign lease proposal received by defendant; and specific sign income being generated [*15] by other properties in the market. At the close of trial, the jury returned a verdict of $10,910 as full compensation for the taking of defendant's property.
The court entered judgment on the verdict.

On appeal defendant initially asserts that his expert, Donald Engel,

should have been allowed to testify to the sign income offered to defendant under the sign lease proposal. Defendant contends that the trial court's preclusion of Engel's testimony violated Federal Rules of Evidence 703 and 705. Further, defendant asserts that "[i]t was never the intent of Judge Conrad's order * * * to dictate to the expert that he could not consider or testify to the proposed sign income as one of the many factors in the formulation of an overall opinion of value."

Federal Rule of Evidence 703 provides:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." (Fed. R. Evid. 703.)

Federal Rule 705 provides: [*16]

"The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." (Fed. R. Evid. 705.) Federal Rules of Evidence 703 and 705 were adopted by the Illinois Supreme Court in Wilson v. Clark (1981), 84 Ill. 2d 186, 417 N.E.2d 1322, cert. denied (1981), 454 U.S. 836, 70 L. Ed. 2d 117, 102 S. Ct. 140.

In view of Federal Rules 703 and 705, Wilson v. Clark, and other case law interpreting the rules, we find that the trial court committed error in precluding the expert from testifying regarding the value of the sign income. Defendant's expert indicated that he considered the value of the sign income in valuating the property at $55,000. On cross-examination, plaintiff's counsel inquired as to the factors which Engel considered in arriving at that valuation amount. Engel

stated the value of the underlying land was $7,600, and that the building added a value of $12,000. The trial court, however, precluded any testimony as to the value of the sign income, a [*17] factor which Engel considered in the $55,000 valuation. The trial court's ruling was error and resulted in confusion for the jury regarding Engel's valuation testimony. The error was heightened when, during closing argument, plaintiff's counsel stated that approximately $30,000 was unaccounted for in Engel's valuation amount.

Case law indicates that wide latitude should be given to experts in testifying as to the basis of their opinions. In Melecosky v. McCarthy Brothers Co. (1986), 115 Ill. 2d 209, 503 N.E.2d 355, the supreme court held that the trial court erred in refusing to admit the opinions of a nontreating medical expert which were based in part upon subjective statements of the plaintiff. (Melecosky, 115 Ill. 2d at 216-17.) In Melecosky, the court quotes Mannino v. International Manufacturing Co. (6th Cir. 1981), 650 F.2d 846, 853, where the Sixth Circuit court stated that "'[g]reat liberality is allowed the expert in determining the basis of his opinions under Rule 703. Whether an opinion should be accepted is not for the trial judge. That is for the finder of fact.'" Melecosky, 115 Ill. 2d at 216.

Melecosky also cites J.L. Simmons [*18] Co. ex rel. Hartford Insurance Group v. Firestone Tire & Rubber Co. (1985), 108 Ill. 2d 106, 483 N.E.2d 273, in which the court upheld the admission of a vocational counselor's expert opinion which was based in part upon a litigant's self-serving statements. Citing Wilson, the court held that the fact that the expert opinion was based upon information received from an interested litigant may affect the weight of the evidence but not its admissibility. (J.L. Simmons Co., 108 Ill. 2d at 117.) The admission in the instant case of valuation testimony by defendant's expert based on the proposed sign lease income would be in accord with the decisions in Wilson, Melecosky, and J.L. Simmons Co., which allow for liberality in the admission of evidence of the basis of an expert's opinion. The testimony by Engel

regarding the value of the sign income clearly comes within that allowable under Federal Rules of Evidence 703 and 705.

Further, we hold that the trial court's finding that the rental income from the sign lease proposal is "speculative" and "futuristic" is contrary to the weight of the evidence. (Laroia v. Reuben (1985), 137 Ill. App. 3d 942, 485 N.E.2d 496; [*19] Phillips & Arnold, Inc. v. Frederick J. Borgsmiller, Inc. (1984), 123 Ill. App. 3d 95, 462 N.E.2d 924.) The record indicates that the document presented an offer to lease which was not speculative but was ready to be signed. The document specifically sets forth the terms of a lease agreement, including the type, size, and shape of the sign, the amount of ground space it would cover, the rental price, and the duration of the lease. The proposal was submitted prior to the date of the petition to condemn. Had the proposal been signed by defendant, it would have formed a binding contract. See Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc. (1986), 114 Ill. 2d 133, 500 N.E.2d 1.

Defendant also contends that the trial court erred by not allowing his expert to testify as to sign income from properties other than the subject property. The record indicates that on direct examination, defendant's attorney asked Engel whether his investigation as to market rentals for similar properties disclosed an "actual dollar average amount that is paid for similar type signs." Engel answered affirmatively, and counsel asked him "what [he] found out." Plaintiff's counsel [*20] objected and the trial court sustained the objection.

Defendant cites Department of Transportation v. Beeson (1985), 137 Ill. App. 3d 908, 485 N.E.2d 511, which held that the Wilson decision and Federal Rules of Evidence 703 and 705 apply to the valuation testimony by appraisal experts regarding comparable sales in eminent domain cases. The Beeson court held that an appraiser should have been allowed to testify specifically regarding all comparable sales he considered in valuating certain property.

Beeson, 137 Ill. App. 3d at 912.

Beeson is distinguishable from the instant case in that Beeson involved the admissibility of comparable sales of properties, while the instant appeal involves the admissibility of comparable uses of property for sign leasing and the income generated therefrom. Nevertheless, the analysis in Beeson is helpful regarding the issue raised in the instant case, since Beeson is helpful regarding the issue raised in the instant case, since Beeson considers the rationale behind Federal Rules of Evidence 703 and 705. In holding that evidence of comparable [*21] sales should be allowed, the court in Beeson stated:

"The application of these rules [Federal Rules of Evidence 703 and 705] to valuation testimony would further the purpose of the rules, which is 'to broaden the basis for expert opinion beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of experts themselves when not in court.' (28 U.S.C.A. R. 703, Notes of Advisory Committee on Proposed Rules, at 98 (1984).)" Beeson, 137 Ill. App. 3d at 912.

We believe that in the instant case, defendant's expert should have been allowed to testify as to an average rental income for other signs, insofar as defendant's expert took into account potential sign rental income in determining the value of the subject property. Testimony regarding the market rental income from other similar signs would shed light upon the basis for the expert's opinion regarding the value of the rental income contained in the sign lease proposal.

In asserting that the trial court did not abuse its discretion in refusing to allow into evidence the sign lease proposal, the City cites City of Chicago v. American National Bank & Trust Co. (1972), 7 Ill. App. [*22] 3d 1006, 288 N.E.2d 627, and Chicago & Evanston R.R. Co. v. Blake (1886), 116 Ill. 163, 4 N.E. 488. These two cases, however, involve the admissibility of future plans of an owner for developing his property. In American National Bank &

Trust Co., the defendant property owner testified that he had taken preliminary steps to develop an 80-unit building on the property. After an objection by the petitioner was sustained, defendant's counsel made an offer of proof that the defendant had secured plans for the building and a tentative commitment for financing. The appellate court found that the exclusion of such plans was within the discretion of the trial court and there was no error or abuse of discretion in their refusal. American National Bank & Trust Co., 7 Ill. App. 3d at 1008.

The court in Blake also held that the admission or exclusion of such plans of a property owner is within the discretion of the trial court. (Blake, 116 Ill. at 167.) If the evidence is offered to enhance damages, by showing a structure would be a profitable investment, the evidence is inadmissible. If the trial court determines that the evidence is offered only to show [*23] a use to which the property is adapted, then the evidence is admissible. (Blake, 116 Ill. at 167-68.) Blake also states, "The practice, however, of introducing such evidence, should not be encouraged, as there is generally more or less danger of its being misunderstood by the jury." Blake, 116 Ill. at 168.

Blake and American National Bank & Trust Co., however, are distinguishable from the instant case. Defendant here does not seek the admission of evidence of future plans of his own to develop the property. Rather, the proffered evidence in the instant case is regarding a proposal received by defendant from a third party to lease a small area of his property. Even assuming that the holding and analysis of Blake and American National Bank & Trust Co. apply to the instant case, we find that the proffered evidence is admissible since it would aid the jury in a determination of the fair cash market value of the property for its highest and best use. The purpose of admitting the testimony should be made clear in order to avoid any danger of misunderstanding by the jury.

Defendant also contends that the proposed use of the property for

advertising is properly [*24] designated as a "special use." The use of certain property is properly designated a "special use" where the property "is of such nature and applied to such special use that it cannot have a market value, such as a church, college, cemetery, club house or terminal of a railroad." (City of Chicago v. Farwell (1918), 286 Ill. 415, 419-20, 121 N.E. 795.) At the trial of the instant case, defendant failed to present evidence that the proposed use of the property was a "special use," nor do we find any indication in the record that the proposed use for sign leasing qualifies as a "special use." Therefore, defendant's argument regarding the special use doctrine must fail.

Defendant also contends that the verdict as to just compensation was contrary to the manifest weight of the evidence, against the preponderance of the evidence, and unreasonable and arbitrary since the jury failed to "factor in" the property's availability for sign leasing purposes. Further, defendant asserts that plaintiff's counsel misstated the evidence and law during closing argument, and the trial judge erred in absenting himself from a portion of the offer of proof made by defendant's counsel.

Since [*25] we are reversing this cause on the grounds that defendant's expert was improperly precluded from testifying as to the valuation of income from the sign lease proposal, we need not specifically address defendant's arguments regrading the amount of the verdict and the offer of proof. We already have discussed briefly the closing argument of plaintiff's counsel and found that counsel made improper remarks regarding the basis of the valuation by defendant's expert. For the purposes of this opinion, we need not further discuss the alleged misstatements of the evidence during closing argument or the judge's allegedly improper conduct during the offer of proof.

Finally, we address defendant's contention that the trial court erred in not allowing into evidence a certified copy of the zoning ordinance. Defendant asserts that the trial court's ruling was

erroneous, particularly in view of the fact that courts are required to take judicial notice of all general ordinances of municipal corporations within the State. The court further committed error, defendant asserts, by not allowing into evidence the official indexes and journal of proceedings of the Chicago city council.

The record indicates [*26] that defendant's expert was allowed to testify that he reviewed the zoning ordinance and found that the proposed use of the subject property for sign leasing purposes would not violate the ordinance. Defendant's expert testified in detail as to the measurements he made in relation to the distance requirements of the ordinance. The trial court, however, precluded defendant's attorney from introducing into evidence a copy of the ordinance itself or related documents, including minutes of Chicago city council meetings during which specific sign approval ordinances were granted.

We find that the trial court did not abuse its discretion in precluding the admission of these documents. (Moore v. Farmers Insurance Exchange (1982), 111 Ill. App. 3d 401, 411, 444 N.E.2d 220.) The admission of these documents would have presented cumulative evidence regarding the content of the zoning ordinance, as defendant's expert testified to the ordinance requirements. (See Rosborough v. City of Moline (1961), 30 Ill. App. 2d 167, 174 N.E.2d 16.) Further, while the admission of a copy of the ordinance may have provided some help to the jury in reviewing the pertinent ordinance requirements, [*27] we do not find that the exclusion of a copy of the ordinance constitutes prejudicial error. In addition, the trial court did not abuse its discretion in precluding the admission of the indexes and journal of proceedings of the city council. Those documents would have provided little help to the jury in their determination of compensation to defendant, as those documents related to matters only tenuously related to the case at hand.

While we find no abuse of discretion regarding the exclusion from evidence of copies of the zoning ordinance and other documents, we

are compelled to reverse the judgment of the trial court and remand this matter for a new trial based on our holding that defendant's expert was improperly precluded from testifying as to the valuation of potential income from the sign lease proposal.

For the foregoing reasons, we reverse the judgment of the circuit court and remand this matter for a new trial.

McNAMARA and RIZZI, JJ., concur.

Judgment reversed and cause remanded.

APPENDIX C

DENIAL OF PETITION FOR REHEARING

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, ILL. 62706
217 782-2035

May 31, 1990

No. 67753 - City of Chicago, etc., appellant, v. Howard A. Anthony, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 11, 1990.

A true copy.

APPENDIX D

Order - Respondents First Motion In Limine

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CITY OF CHICAGO, a municipal Corporation,	)	
Plaintiff,	)	
vs.	)	85 L 50166
	)	Central West Project
HOWARD ANTHONY, et al.,	)	
Defendants.	)	PARCEL (S): 67-1

ORDER

Entered: January 22, 1986

THIS MATTER COMING TO be heard on Plaintiff's Motion in Limine to exclude from the trial of this cause the following:

A document entitled "SIGN LEASE PROPOSAL", dated February 12, 1985 from Outdoor Media, Inc. to Howard Anthony marked as Exhibit C and attached to Plaintiff's memorandum; any testimony which attempts to value the sign lease proposal separate from the fair cash market value of the land as a whole; any testimony which either relates the particulars of the sign lease proposal or considers, in whole or in part, any anticipated future rental income to be derived from payments as provided in said sign lease proposal in reaching a determination of fair cash market value of the subject property; and,

All parties being before the Court and the Court having jurisdiction over the subject matter herein; and the Court having considered the, Memoranda of Law filed by both parties having heard the arguments of counsel and otherwise being fully advised in the premises finds the facts and states the conclusions of law as follows:

FINDING OF FACTS

1. The document called sign lease proposal is not an actual lease, nor is it a bonafide offer to purchase the subject property;

2. The document is an initial contact letter setting forth a proposed business opportunity;

3. The proposed rental income set forth in the document is not only contingent upon agreement of the parties but is further subject to various contingencies including compliance with the zoning ordinances and receipt of City Council approval, and accordingly, the rental income described therein is speculative and certainly futuristic.

futuristic.

CONCLUSIONS OF LAW

4. The subject property must be valued as a whole. A leasehold interest may not be valued separately and added to other estimates of value to form an opinion as to the value of the whole property.

5. The document entitled sign lease proposal is hereby excluded and shall not be admitted into evidence. The introduction of the document would tend to confuse and prejudice the jury.

6. Federal Rules of Evidence 703 and 705, adopted by the Illinois Supreme Court in Wilson v. Clark., 84 Ill.2d 186, will be deemed to apply in this cause. As fined in Department of Transportation vs. Beeson 137 Ill App 3rd 908

It is, therefore, ordered as follows:

a. The document entitled Sign Lease Proposal is inadmissible as evidence in the trial of this cause.

b. Testimony which separately values the proposed sign lease hold is inadmissible as evidence in the trial of this cause.

c. Testimony regarding future rental income to be derived from the sign lease proposal is inadmissible as evidence in the trial of this cause.

d. Within the limited context of testimony regarding highest and best uses of the subject property, testimony of experts who may have considered the sign lease proposal as a factor in reaching a determination of highest and best use of the property may be allowed; however, nothing in this order shall be considered a ruling that otherwise inadmissible evidence will be admitted for all purposes through the testimony of an expert valuation witness, and

the Court will so instruct the jury.

e. Transcript of proceedings is attached hereto.

ENTER: *Sig.* Judge Mary Conrad

DATE: January 22, 1986

APPENDIX E

Transcript of Proceedings Incorporated Into Court Order Of January 22, 1986 Appendix D

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - LAW DIVISION

CITY OF CHICAGO, a Municipal Corporation,	)	
Petitioner,	)	
-vs—	)	85 L 50166
HOWARD A. ANTHONY,	)	
Respondent.	)	

REPORT OF PROCEEDINGS BEFORE
MOTION JUDGE ON
DECEMBER 20, 1985

STATE OF ILLINOIS)
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - LAW DIVISION

CITY OF CHICAGO, a Municipal Corporation,	)	
Petitioner,	)	
-vs—	)	85 L 50166
HOWARD A. ANTHONY,	)	
Respondent.	)	

Record of proceedings before the Honorable MARY M. CONRAD, Judge of the Circuit Court of Cook County, Illinois, commencing at 12:00 o'clock p.m. on the 20th day of December, A.D., 1985, upon the above entitled cause.

APPEARANCES:

MR . JAMES D. MONTGOMERY
Corporation Counsel, by
MS . CHERYL I. HARRIS,
Assistant Corporation Counsel,
for the Petitioner;

RONALD A. SHUDNOW,
for the Respondent.

MS. HARRIS: City of Chicago versus Howard Anthony, et al., case number 85 L 50166, parcel 67-1.

THE COURT: Let the record show that Cheryl Harris here representing the City, and Ron Shudnow. Do you want to spell it?

MR. SHUDNOW: S h u d n o w.

THE COURT: It's here on a matter for decision based on the motion in limine filed by the City, and the Defendant's response to that motion. A hearing was held on the motion on December 10, 1985. By its motion, the City seeks to exclude from evidence presented to a jury, the following:

1) A document entitled "Signed Lease Proposal" which is marked Exhibit C and attached to the City's memorandum.

2) Any appraisal testimony which attempts to value the Signed Lease Proposal as part, separate from the whole property, and

3) Any testimony which either a) relates to the particular Signed Lease Proposal or b) considers in the property evaluation nine future rental income set forth in the Signed Lease Proposal.

The Defendant contends that the

Signed Lease Proposal is admissible to support his theory of the property's highest and best use, and that the proposed rental income appearing in the signed lease proposal is relevant to determine a proper value of the property at its highest and best use.

Taking the second request first, after listening to both parties and reading the memorandums submitted, as well as the appropriate case law, the Court finds that not only do the parties agree, but they correctly agree as a matter of law. The property must be valued as a whole, and a lease cannot be separately valued as a part to be added to other parts.

Therefore, the City's motion as to this issue is granted.

Addressing the admissibility of the document itself, the Court finds a) The document is not an offer to purchase the property for cash as discussed in the cited case law or existing case law. b) The document is not an actual lease. c) The document is an initial contact letter setting forth the proposed business opportunity. d) The rental income set forth in the document is contingent upon not only both parties agreeing to enter into a leasing agreement, but to the proposed advertising, means, zoning ordinances an receiving sic counsel.

Under these circumstance, the rental income described is speculative and certainly futuristic.

The document entitled Signed Lease Proposal would be excluded from evidence. The Court believes the document would be prejudicial and has the danger of being misunderstood by the jury. See City of Chicago versus American National Bank and Trust Company, 7 Illinois Appellate 3rd, 1006.

Turning now to the last request for exclusion, the Court will allow testimony as to Defendant's theory of highest and best use for the property and testimony as to the value of the property at its highest and best use in that limited context. The Court will allow testimony related to the specific signed lease proposal which would be acceptable under Federal Rules of Evidence, 703 and 705, which were adopted by the Illinois Supreme Court in 1981 in Wilson versus Clark, 84, Illinois 2nd, 186. And also in Department of Transportation versus Charles Beeson, B-e-e-s-o-n, out of the Appellate Court of Illinois, 2nd District. And it's only a slip opinion. It's filed November 4, 1985, under No. 2-84-662. All right.

Nothing in this order shall be considered a ruling that otherwise inadmissible evidence will be admitted for purposes through the testimony of the expert evaluation witnesses, and the Court shall instruct the jury on that.

MR. SHUDNOW: What was that last point?

THE COURT: Which one?

MR. SHUDNOW: The last two sentences.

MR. SHUDNOW: The last two sentences.

THE COURT: Nothing in this order shall be considered a ruling that otherwise inadmissible evidence will be admitted for all purposes through the testimony of an expert evaluation witness, and the Court will instruct the jury on that. You will see the import of that after you read the Beeson case.

MS. HARRIS: Your Honor, I have read the Beeson case. I would just ask the Court, the Beeson case does not really directly address the issue before the Court here. I understand the Court's ruling in terms of the general findings of the Beeson Court with respect to the applicability of Wilson versus Clark. I just wanted to ask if I could for point of clarification, the Court has said that it will be allowed, the admission of the Signed Lease Proposal for the limited purpose of highest and best use as advanced by the Defendant.

THE COURT: Right. If the Defendant's highest and best use people come in and testify that either the evaluation witnesses or the land planners, or the developers come in and testify that in their opinion the land is best used and its highest and best use could be for Sign lease advertising, and then you get into an examination as to what is the basis of his decision, and he gets into the fact that there were offers with regard to a signed lease being put on and that was received before, according to the Federal Rules, we are going to be able to get into various things with regard to that signed lease proposal. He's going to be able to say that that was a factor in

his consideration of what was the highest and best use.

MS. HARRIS: Your Honor, if I may? Then if I understand the Court's ruling, are you saying that on direct examination that the defendant can put into evidence the specifics of this signed lease proposal including the rental income?

THE COURT: Now, no, I am not saying that.

MS. HARRIS: All right.

THE COURT: No, I am not.

MR. SHUDNOW: But the --

THE COURT: The rental income is speculative and conjecture. But he can sat he took into consideration that there would be a rental income that is produced by that property.

MS. HARRIS: But the particulars of this rental--

THE COURT: Particulars of this --

MS. HARRIS: --proposal would not be admissible on direct?

THE COURT: Right. Because it's not an actual lease at this time.

MR. SHUDNOW: Here's the -- okay, I understand your last point. Of course, I, you know, totally disagree with your decision as far as it being

speculative and so forth, because if you have -- well, I won't say you haven't read, but if you had looked at the Appellate Court cases that were reversed by the Supreme Court, you read the particular which they laid down the specific facts, more so than the

Supreme Court. The Supreme Court summarize the facts but if you had read the Appellate Court, where they gave the specific on the information, and tried to get in all of that speculative and projected and so forth. It had to do with them coming at a rent figure where there wag no third party involved, and measured by a percentage of gross receipts which were deemed to be a speculative way of approaching it to get to the rental. But those cases had absolutely nothing to do with this fact situation. Nothing whatsoever.

THE COURT: But as that proposal exists today, that particular sign that is in that proposal --

MR. SHUDNOW: But see, equity regards that --

THE COURT: Hold it. We have to stop.

(Whereupon there was break in the proceedings.)

MR. SHUDNOW: See, the crux of the matter is that if he would have accepted the proposal, and there was no condemnation, there would be absolutely no problem with your Honor even thinking about this issue because it would have been there. In equity, equity regards that as done that ought to be done. And what happened here is the intervention of a condemnation

suit where it would have been morally wrong. Your decision, by saying that it is speculative and -- in effect you are punishing him from not doing an immoral act.

THE COURT: I understand that. That was the basis of your oral argument before the Court also. I have heard that. I have considered that, and I don't find that that would persuade me other than what the case law has said.

MR. SHUDNOW: But see --

THE COURT: The way I interpret it.

MR. SHUDNOW: All of those cases -- I just want to bring this point up. All of those cases dealt with restaurant with businesses where they attempted to arrive at a speculative rental to be capitalized. They were special-use facilities.

THE COURT: Right.

MR. SHUDNOW: They said you could do it with special use.

THE COURT: I understand what you are saying.

MR. SHUDNOW: This was not that situation. This was not taking business activity and trying to come up with a speculative rental of what it would have been. This was entirely different. This was more.

There was a third party bona fide type of offer that did not emanate from the condemnation itself.

THE COURT: I understand what you are saying. It's still a signed proposal.

MR. SHUDNOW: It was more analogous to --

THE COURT: No, I'm sorry. I reject your argument at this point, and I am going to stand on my ruling.

MR. SHUDNOW: Yes.

THE COURT: Also I am going to cite to you another case. Kankakee Park District versus Heidenreich, H-e-i-d-e-n-r-e-i-c-h, 228, Illinois 188.

MS. HARRIS: Your Honor, if I may --

MR. SHUDNOW: I'd lake to clarify that last point that you were saying. Now, an expert witness can testify as to what the highest and best use --

THE COURT: You are going to have to read the case and read the Federal Rules and make your own determination, because I don't want to tell you how to try your case. If we have any further problem with this when you have developed the case, we will be able to decide all of this at pretrial.

MR. SHUDNOW: Okay. Now, are you -- I just want a clarification. The proposal itself would be

excludable?

THE COURT: The proposal itself.

MR. SHUDNOW: Merely for the purpose of -- if we attempt to value?

THE COURT: No, the document itself is going to be out.

MR. SHUDNOW: But testimony relating to the fact that you received it?

THE COURT: Testimony relating to the document, if it is within 703 and 705, I have no choice but to allow it in that limited context if it fits within the Federal Rules --

MS. HARRIS: Now, would you --

THE COURT: -- in the Beeson case.

MS. HARRIS: -- then allow the admission of the rental income--stated in the proposal --

THE COURT: I said no.

MS. HARRIS: -- under Beeson? Okay, very well.

THE COURT: Unless at a future time at the pretrial you can somehow say that my interpretation of this with regard to that testimony as to the rental income is wrong. I don't think you can.

MS. HARRIS: I see.

MR. SHUDNOW: As to the rental income?

THE COURT: As to the specific figures listed.

MR. SHUDNOW: Well, Are you saying that it's speculative?

THE COURT: I am saying it is speculative under the signed lease proposal that is given right now. It is speculative and conjecture. That's all I am going to say.

MR. SHUDNOW: Because I can have him enter into a lease right now, you know. I just tell him not to erect it because that's what they would have done. That's the concept of equitable conversion.

THE COURT: I understand what you are saying.

MR. SHUDNOW: As a matter of fact, there was one case, I don't recall the cite, but they in effect punished somebody because they entered -- they did something knowing that there was a condemnation, which lead to the Court chastised them for doing that. Now, my man is being punished directly for not entering into something and not allowing somebody to incur costs. And I don't think the intent of the law could ever want that kind of a result.

MS. HARRIS: Your Honor, if I may? I know that your Honor has heard argument on this point. I just want to really to direct my question to clarification

of what your order ordered here today. But as long as Mr. Shudnow has brought it up, I do believe the Court might take notice of the last hearing when we got into argument of the applicability and the zoning ordinance was raised. Mr. Shudnow indicated at if, in fact, if proved that the proposed sign would not be a permitted one under the existing ordnance, then

the proposal would be revised. That is precisely my point.

THE COURT: That's what I am saying.

MS. HARRIS: That's why it's speculative.

THE COURT: It's specified in that letter. It's speculative and conjecture at this point.

MR. SHUDNOW: Well, first of all --

THE COURT: I don't want to hear anymore gentlemen and --

MR. SHUDNOW: You did rule on that point --

THE COURT: Yes, I did.

MR. SHUDNOW: --as to whether it was a violation of the zoning ordinance, although that was one of the issued before the court.

THE COURT: I said the record will speak for itself at this point. Draft an order. If you wish, the order can read that the motion in limine it granted as to the certain element, one and two and three; that the motion is -- well, half denied and half not denied. Buy you can work that out by attaching a copy of that transcript to the order.

MS. HARRIS: Yes, your Honor, I was going to suggest that we do that because it is complex, and I want to make sure that Counsel and I have some agreement on the language of the order.

THE COURT: All right.

MS. HARRIS: Thank you very much.

MR. SHUDNOW: Thank you, Judge.

(Which were all the proceedings had at this time.)

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

GEORGETTE A. HIEBER, being first duly sworn, on oath says that the she is a Certified Short-hand Reporter, that she reported in shorthand the proceedings given at the taking of said hearing, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains all the proceedings given at said hearing.

Sig.

Subscribed and sworn to
before me this 23rd day
of December, A.D.,
1985

Sig
Notary Public

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

I, _____ presiding Judge at the hearing in the above-entitled cause do hereby certify that the above and foregoing is a true and correct Report of Proceedings at the said hearing.

And, forasmuch, therefore, as the matters and things herein before set forth do not otherwise fully appear of record, the defendant

tenders this, its Report of Proceedings, and prays that the same may be signed and sealed by the presiding Judge pursuant to the statute in such case made and provided.

Which is accordingly done this _____,

day of _____, 1986.

_____

Presiding Judge

APPENDIX F

ORDER-RESPONDENT'S SECOND MOTION IN LIMINE

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

CITY OF CHICAGO, a Municipal Corporation,	)	
Petitioner,	)	
VS.	)	No. 85 L 50166
HOWARD A. ANTHONY, et al.,	)	Parcel 67-1
	)	Condemnation Project
Defendants.	)	Project: Central West

ORDER

Entered: July 28, 1986

ORDER

This matter coming on to be heard on Plaintiff's Motion in Limine filed June 12, 1986 for the entry of an order barring Defendant's expert witness DON ENGEL from testifying to an opinion of value based in whole or in part upon evidence of future rental income from a sign lease proposal, the Court having considered Defendant's Response to Plaintiff's Motion in Limine and Defendant's Memorandum of Law in support thereof and having heard the arguments of respective counsel, Ronald A. Shudnow for the Defendant and Cheryl Harris for the Plaintiff and having jurisdiction of the subject matter and the parties hereto:

IT IS HEREBY ORDERED THAT:

1. Defendant's expert may express an opinion of value and if asked on direct examination what facts or underlying data did the appraiser take into consideration in making his opinion, he will not be allowed to testify as to income as set forth in the sign lease proposal.

2. This does not prohibit Defendant's appraiser from testifying about other facts or underlying data of the type which is usually relied upon by appraisers including other sign income in formulating an opinion of value.

ENTER:

Sig_____

JUDGE

DATED: July 28, 1986

APPENDIX G

FIRST PAGE OF SIGN LEASE PROPOSAL
(reproduced on two pages)
RECEIVED BY PETITIONER FROM
OUTDOOR MEDIA, INCORPORATED

DATED: FEBRUARY 12, 1985

62a

OUTDOOR MEDIA
INCORPORATED

February 12, 1985

Mr. Howard A. Anthony
10532 S. Peoria
Chicago, IL 60643

Dear Mr. Anthony:

RE: SIGN LEASE PROPOSAL

I wish to speak with you in regard to leasing approximately 48 inches of ground space for one of our one pole, all steel advertising structures with visibility from the Eisenhower Expressway. We have advertisers who wish to display their message to the flow of traffic on the Eisenhower.

We can situate this structure in an area that will not interfere with the business activity conducted on the property. Please review the following:

The dimensions of the sign are as follows:
- diameter of the pole is approximately 48"
- height of the sign from ground level until the bottom of the sign is approximately 55'
- height of the sign is 20'
- width of the sign is 60'.

The sign will be illuminated at night, with all electrical costs furnished by Outdoor Media Inc. A separate meter will be attached to the sign pole.

Also, Outdoor Media has extensive insurance coverage (see enclosed).

All permit fees, maintenance costs, construction costs, etc., will be furnished by Outdoor Media Inc.

Outdoor Media will not advertise any competitive or offensive message on the display.

For the privilege of erecting and maintaining the advertising structure, Outdoor Media Inc. will furnish the landlord the following payments for the duration of the lease - fifteen (15) years:

$5200 per year ($433 per month) for the first three years = $15,600
$5600 per year ($467 per month) for the second three years = $16,800
$6200 per year ($517 per month) for the third three years = $18,600
$6700 per year ($558 per month) for the fourth three years = $20,100
$7500 per year ($625 per month) for the fifth three years = $22,500

TOTAL= $93,600.

I shall phone your office next week for your thoughts; and I thank you in advance for your time and cooperation on this matter.

Sincerely

sig.
J. Berg
Real Estate Manager

APPENDIX H
STATUTES INVOLVED

The jurisdiction of this Court to review the judgment of the Supreme Court of Illinois is invoked under 28 U.S.C. §1257(3):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari, ...where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." (Emphasis Ours)

28 U.S.C. *Federal Rules:*

Rule 703. **Basis of Opinion Testimony by Experts**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Rule 705. **Disclosure of Facts or Data Underlying Expert opinion.**

"The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data unless the Court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

U.S. Constitution: Amendment V:

"...nor shall private property be taken for public use, without just compensation."

U.S. Constitution: Amendment XIV, Section 1:

"....nor shall any State deprive any person of life, liberty, or property, without due process of law...."